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Supreme Court of the United States

OCTOBER TERM, 1940

No. 323

AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE,
Petitioner,

versus

CITY OF SANFORD, FLORIDA, ET AL.,

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals of the Fifth Circuit.

AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE,
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August, 1940.

HAUSER PRINTING CO., NEW ORLEANS

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I.

Petitioner, American National Bank of Nashville, Tennessee, seeks a **writ of certiorari** to the United States Circuit Court of Appeals, Fifth Circuit, to review its judgment rendered May 31, 1940 (R. 164-170), rehearing refused July 8, 1940, 112 Fed. (2d) 435, affirming an order of the United States District Court for the Southern District of Florida (R. 153). This application is made prior to August 15, 1940.

II.

Jurisdiction of this Court is asserted under Judicial Code §240 and §262, as amended, U. S. C. A. Title 28, Sections 347 and 377; Chapter IV, Sec. 24(c) Bankruptcy Law, as amended (Chandler Act), U. S. C. A., Title 11, Sec. 47, and Rule 38 of this Court.

239 U. S. 11, *Central Trust v. Lueders.*
191 U. S. 115, *Holden v. Stratton.*

III.

The statute of the United States, the application and constitutionality of which are in question is Section 83(j) of the Municipal Bankruptcy Act, as amended, 11 U. S. C. A. §403.[1]

IV.

Summary and Brief Statement. The facts are that on February 1, 1937, the City of Sanford proposed to its bondholders a **plan of** voluntary adjustment, which 87% of those bondholders accepted unconditionally, surrendering their old rights and acquiring new ones. Subsequently, in January, 1939, the City proposed a **plan of composition** and sought to coerce the non-assenting bondholders into it by using the consents of the bondholders who had refunded and who were unaffected by the **plan of composition.** The questions sought to be reviewed are:

(1) 83(j):
"The partial completion or execution of any **plan of composition** as outlined in any petition filed under the terms of this title by the exchange of new evidences of indebtedness under the plan for evidences of indebtedness covered by the plan, whether such partial completion or execution of such **plan of composition** occurred before or after the filing of said petition, shall not be construed as limiting or prohibiting the effect of this title, and the written consent of the holders of any securities outstanding as the result of any such partial completion or execution of any **plan of composition** shall be included as consenting creditors to such **plan of composition** in determining the percentage of securities affected by such **plan of composition.**"

(a) Can the recent amendment designated as 83(j) of the Municipal Bankruptcy Act (11 U. S. C. A. §403) be construed as applying not only to securities issued under a partially completed **"plan of composition"** in which the securities issued are necessarily issued and received contingently upon the completion of the entire plan so that if the plan is not completed the acceptors are entitled to the return to the *status quo ante* and therefore always remain in the same class with the non-assentors, but also to securities issued under a **plan of voluntary adjustment** in which the securities issued are received and accepted irrevocably and unconditionally, regardless of the completion of the plan in which the return to the *status quo ante* is expressly prohibited by the State law so that acceptors immediately step out of the class of non-assentors?

(b) If 83(j) is construed as permitting persons who under a plan of voluntary adjustment irrevocably accepted "refunding bonds", carrying different and less rights from "old bonds" prior to the adoption of that statute, to reduce the rights of the "old bonds" against the will of the holders of such "old bonds", does it not deny due process and go beyond the limit of constitutional legislation?

Petitioner contends:

(1) That the decision of the Court of Appeals that "nothing in this acceptance prevents the City and the acceptors from undoing the whole plan" (voluntary adjustment plan of Feb. 1, 1937, R. 23) is in direct conflict with (a) the statutes of Florida, (b) the decisions of the Supreme Court of Florida, (c) the City charter of Sanford and (d) the express provisions of the **"plan of voluntary adjustment"**.

(2) That when 87% of the bondholders of City of

Sanford unconditionally accepted "refunding bonds", with rights different from the old bonds, they placed themselves in a different classification from the holders of "old bonds", their bonds were payable from a sinking fund not available to the "old bonds", 193 So. 297, *State Ex Rel Garland vs. City of West Palm Beach.*

(3) That 83(j) is not applicable to the case at bar because:

(a) 83(j), although only some ten lines long, repeats five times that its application is restricted to a partially completed **plan of composition,** and a partial completion of a **plan of composition** is vastly different from a partial completion of a **plan of voluntary adjustment,** in which the securities in this case were issued.

(b) 83(j) authorizes the use of the "written consent of the holders of any securities outstanding as the result of any such partial completion or execution of any plan of composition." The securities whose consent is sought to be used in this case were not the result of the partial completion or execution of a **plan of composition.** The difference is vital. Securities accepted in partial completion of a **plan of composition** are accepted with the understanding that on non-completion of the plan, the security holder returns to the *status quo ante*, that is to say, he remains at all times in the same class with the non-assenting security holders. The securities in this case were the result of the partial completion of a **plan of voluntary adjustment.** They were accepted unconditionally and irrevocably. By accepting them, the receivers placed themselves in a different class from the non-assenting security holders. Under the State law, they are expressly prohibited from being returned to the *status quo ante.*

(c) 83(j) does not purport to and does not authorize coercion by creditors of a class whose

rights **are not** affected by a proposed **plan of composition** upon creditors whose rights **are** thereby materially affected. In this case such coercion is being exercised.

(d) 83(j) is not applicable because the plan proposed must be considered either as of date February 1, 1937, in which case it was not a **plan of composition,** because: (1) as there was no Municipal Bankruptcy Act in effect on February 1, 1937, it could not have been a **plan of composition** under the Bankruptcy Act, (2) it did not contemplate the submission to or approval by any court, (3) it did not contemplate coercion of the minority and (4) it did not contemplate collective action, but individual action; or else as of date January 28, 1939, in which case those bondholders who had already accepted the **plan of voluntary adjustment,** and unconditionally surrendered their **"old bonds"** were not affected by the plan, and 83(j) does not purport to change those provisions of the Act which require the consent of 51% of the bondholders affected by the plan.

(e) 83(j) should not be construed as having retroactive application to securities received and rights abandoned before its adoption.

(4) That if 83(j) be construed as applicable to the case at bar and as authorizing creditors whose rights are unchanged by a **plan of composition** to compel acceptance of that plan by creditors whose rights are materially curtailed by that plan, it is null and void as being in violation of the provisions of the Federal Constitution.

V.

The questions presented are as follows:

In 1937 after the first Municipal Bankruptcy Act had been declared unconstitutional (298 U. S. 513, *Ashton*

case) and before the adoption of the present Municipal Bankruptcy Act (304 U. S. 27, *Bekins* case) or Section (j) thereof, the City of Sanford, Florida (R. 23) offered to its bondholders, or **any of them who chose to accept it,** regardless of acceptance or rejection by the others, a **plan of voluntary adjustment** under which the accepting bondholders were to surrender and cancel their "old bonds" and coupons and accept new bonds, providing for certain reductions of future interest and scaled down by the elimination of the past due interest coupons. This plan was not and **could not have been a composition** under the Bankruptcy Act, since there was no Bankruptcy Act in existence when it was offered and since it was purely voluntary and contemplated no compulsion of non-assentors. Some 87% of the bondholders accepted this offer; surrendered and cancelled their "old bonds" and coupons unconditionally and irrevocably and accepted in lieu thereof new bonds which did not include the past due coupons. (R. 2) The validity of these new bonds was established by decision of the Supreme Court of Florida on March 16, 1937 (R. 3) *State v. City of Sanford,* 174 So. 339. The Florida law, as construed by the Supreme Court of Florida, prohibits the restoration of bondholders who accept such a voluntary adjustment and surrender their "old bonds" from being restored to their former status.[1] (Unfortunately, the Circuit Court of Appeals fell into

(1) Section 8, Chapter 15,772, laws of Florida, 1931.

This Section permits bonds to be exchanged "for not less than an equal principal amount and for accrued interest of debts to be retired thereby".

Section 14 provides that:

"the principal and accrued interest of the refunding bonds shall not exceed the amount of the obligations refunded".

190 So. 774, City of Miami v. State:

"When bonds are purchased for redemption, cancellation and retirement, interest thereon should be paid only to the date of delivery, and all current and future interest coupons that should be thereon should be delivered with the refunded bonds, and both bonds and coupons should be duly listed of record and cancelled and **permanently retired from circulation, or any other use whatever.**"

error on this point and believed erroneously that the Florida law permitted the restoration of the *status quo ante.* Vid. *infra,* p. 12).

The City charter and the **voluntary adjustment plan** contained similar inhibitions which were accepted by the assenting bondholders.(2)

Thus at the date of the adoption by Congress of the second Municipal Bankruptcy Act, the municipal indebtedness of the City of Sanford really consisted of two series of bonds, **first** outstanding "old bonds" and **second,** outstanding "refunding bonds". **The rights of the two series were materially different.** With its indebtedness in this position, the City of Sanford after the adoption of the second Municipal Bankruptcy Act (Chandler Act) and after the adoption of the amendment thereof contained in Section 83(j) *supra* filed a petition (R. 1-81, incl.) for a composition of its debts under Chapter 9 of the Chandler Act. This **plan of composition** did not propose to change in any manner whatever the rights of the holders of the **"refunding bonds"** as they then existed, but did propose to change materially the rights of the holders of the **"old bonds"** who had refused to refund. The Chandler Act(1) requires the bankruptcy petition to

(2) Charter City of Sanford, Chapter 9897, laws of Florida, 1923 (Special Acts, Vol. 2), Section 123.

City of Sanford's voluntary adjustment offer (R. 41):

"Section 6. Upon delivery of the refunding bonds in exchange for outstanding bonds, all past due coupons, if any, shall be detached from the refunding bonds and cancelled by the City, and all unmatured coupons shall be attached thereto."

Page 46:

"Section 15. The refunding bonds authorized hereby when executed shall be delivered to the holders of the outstanding bonds to be refunded thereby and/or the holders of judgments in exchange for and upon surrender of an amount of such bonds and/or the satisfaction of any judgment obtained upon a principal amount of such bonds equal to the face amount of the refunding bonds exchanged therefor."

See also R. 3, 7, and 75.

(1) The Chandler Act contains the following provisions:
USCA Title 11, §402

"The term 'security affected by the plan' means a security

show that creditors of the petitioner owning not less than 51% in amount of the securities **affected by the plan** have accepted it in writing. The City of Sanford in an effort to meet this jurisdictional prerequisite attached to its petition the written consents of a large number of the holders of "refunding bonds". By stipulation, only one such consent has been printed (R. 82). The consents so obtained do not amount to 51% of the non-assenting old bondholders who **are** materially affected by the plan (not one single non-assenting old bondholder has consented) but they do amount to 51% of the total outstanding bonded indebtedness, including the holders of the "refunding bonds" who **are not** at all affected by the plan, and the holders of the "old bonds" who **are** materially affected by the plan.

To this petition, the American National Bank of Nashville, petitioner herein, and two other non-assenting bondholders made timely objection, challenging the sufficiency of the petition as a matter of law and asserting that Section 83(j) of the Bankruptcy Act was not applicable, and if held applicable, was unconstitutional, and asking that the Attorney General of the United States be notified, which was done, and that office filed a brief and made an oral argument herein. The Bank moreover asserted (R. 109, *et seq.*) that it was the holder of more

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as to which the rights of its holder are proposed to be adjusted or modified materially by the consummation of a composition agreement."

§403:

"The petition shall state that a plan of composition has been prepared, is filed and submitted with the petition, and that creditors of the petitioner owning no less than 51% in amount of the securities affected by the plan (excluding, however, any such securities owned, held or controlled by the petitioner), have accepted it in writing. * * *

"No creditor shall be deemed to be affected by any plan of composition unless the same shall affect his interest materially, and in case any controversy shall arise as to whether any creditor or class of creditors shall or shall not be affected, the issue shall be determined by the judge, after hearing, upon notice to the parties interested."

than 50% of the unrefunded or "old bonds" which alone were affected by the proposed plan,[1] that it had not consented to the plan and that the City's petition should be dismissed for failure to show, as required by the statute, that the 51% of the securities affected by the plan had accepted it in writing. This application to dismiss, after hearing before a Master, was denied by the District Court (R. 153) and from the affirmance of this decree by the Fifth Circuit Court of Appeals, this application for certiorari is prosecuted.

The Bank contends:

(a) That the decision of the Court of Appeals that "nothing in this acceptance prevents the City and the acceptors from undoing the whole plan" (voluntary adjustment plan of February 1, 1937, R. 23) is in conflict with (a) statutes of the State of Florida, (b) the decisions of the Supreme Court of Florida, (c) the City charter of Sanford and (d) the express provisions of the **plan of voluntary adjustment.** *Supra* pp. 6 and 7.

(b) That the amendment contained in 83(j) of the Bankruptcy Act cannot be held to justify the use of the consents of the holders of unaffected "refunding bonds" received in a **plan of voluntary adjustment** to coerce the holders of "old bonds" into acquiescence in a subsequently filed **plan of composition** for the reasons:

> (1) That 83(j), although only some ten lines lines long, repeats five times that its application is restricted to the partial completion of **a plan of composition,** a term which has a well-defined

(1) Petitioner's claim was for $152,000 and the total unscaled and unrefunded old bonds outstanding amounted to the principal sum of $246,000.

meaning in bankruptcy parlance,[1] and that the partial completion of a **plan of composition,** which alone is mentioned in the statute, is very different from the partial completion of the **plan of voluntary adjustment,** in which the securities in this case were received.

(2) That 83(j) authorizes the use of the "written consent of the holders of any securities" outstanding as the result of any such partial completion or execution of any **plan of composition** and the securities outstanding in the present case were not securities accepted in partial completion of a **plan of composition,** in which case their final retention would necessarily have been dependent on the final completion of the composition, but were securities which were unconditionally and irrevocably accepted by each individual bondholder as a result of an offer of **voluntary adjustment.** There is a vast difference between the two classes of securities. In a **plan of composition** not individual, but collective, action is contemplated. The acceptance of the securities is contingent and conditional upon the entire plan becoming operative. In the **plan of voluntary adjustment,** each bondholder acted for himself and finally surrendered his "old bonds" and received his new bonds inde-

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(1) 96 Fed. (2) 85, In Re: City of West Palm Beach:

"The Municipal Bankruptcy Act speaks uniformly of a 'plan of composition'. In bankruptcy matters, composition has a special meaning, to-wit: a settlement or adjustment which is enforced by the court on all creditors after its acceptance by a required majority. A proposed adjustment out of court is not a plan of composition, but may become one by being presented to the court. That the present adjustment was proposed and largely accepted before the Act was passed and of course not as a plan of composition, would, if it remained executory, possibly not prevent its presentation for enforcement under the Act. * * * Whether the plan must have been offered and accepted as a plan of composition rather than as a plan of voluntary adjustment we need not decide since the plan with its acceptance became incapable of presentation as a composition, because it had been largely executed."

263 Fed. 926, In Re: Bickmore Shoe Company.
17 Fed. Cases 9479, In Re: Meriam.
53 Vermont 491, First National Bank vs. St. Albans.
8 Corpus Juris Secundum Bankruptcy, Sec. 653.

pendently of the action of any other bondholder. In the **plan of voluntary adjustment,** individual bondholders by going in or staying out were able to achieve different results. In a **plan of composition,** it is contemplated that the result to all bondholders shall be uniform. The consent is not final, but is contingent.[1]

That the consents given by the assenting bondholders prior to the adoption of 83(j) to the **voluntary adjustment plan** were not consents to a **plan of composition** within the meaning of Section 83(j) of the Bankruptcy Act affirmatively appears from the following:

(a) The original **voluntary adjustment** offer was made by the City of Sanford in 1937; i. e., at a time when there was no Bankruptcy Act in effect and when, therefore, there could not possibly have been formulated a **plan of composition** within the meaning of the Bankruptcy Act.

(b) The **voluntary adjustment plan** (R. 23, *et seq.*) did not contemplate submission to any court.

(c) It did not contemplate coercion of the non-assenting minority.

(d) Under the Florida refunding statute, Section 2, the **voluntary adjustment plan** was offered and might have been finally accepted by any individual bondholder, regardless of the action of any other bondholder, and such offer was actually finally accepted voluntarily by some 87% of the outstanding bondholders who surrendered their original bonds and accepted new scaled-down bonds, regardless of the action or non-action of all other bondholders. There was nothing contingent about the

(1) 263 Fed. 926, In Re: Bickmore Shoe Co.
"A composition is of no avail unless confirmed by the court after a judicial hearing. It results not alone in a contract between those who have assented, but in a judgment imposing its terms upon those who have not assented", etc.

acceptance. Each assentor agreed irrevocably for himself, surrendered his "old bonds" and coupons unconditionally and irrevocably, and thereby completed his individual independent settlement with the City. The failure of these consents to be consents to a **plan of composition** is most important since (1) Section 83(j) is specifically and meticulously confined to a partially completed **plan of composition,** and (2) a comparison of the decisions of this Court in the *Ashton* case (298 U. S. 513), in which the first Municipal Bankruptcy Act was held unconstitutional, with that in the *Bekins* case (304 U. S. 27), where the second Bankruptcy Act was held constitutional, indicates that the distinction between the two statutes consists largely of the fact that the old Bankruptcy Act was bottomed on Chapter 9, which permits the full surrender of contract rights under **the bankruptcy power** (a compulsory surrender not available to the States), whereas the second Bankruptcy Act was bottomed on Chapter 10, **the composition statute,** which contemplates a compromise settlement based upon the **consent** of the majority of the creditors similarly situated.

(3) That under the Florida law, as construed by the Supreme Court of that State, when certain bondholders of the City of Sanford surrendered their "old bonds" and accepted "refunding bonds" under the **voluntary adjustment plan,** they irrevocably and unconditionally shrunk their claims to lower figures and acquired different rights in different funds, and thus came into a classification different from that of the holders of the original "old bonds". *State ex Rel Garland vs. City of Palm Beach,* 193 So. 297. They thereby lost the power of coercion over the holders of the "old bonds". 83(j) does not contemplate the coercion of one class of creditors by

another class dissimilarly situated.[1] It contemplates the completion of a partially completed **composition**, in which certain of the creditors of a designated class had already accepted a shrinkage of their claims, their acceptance being contingent upon all claims of that class being shrunk accordingly. In such a case, coercion was authorized by the statute because the creditors coercing remained in the same class with those being coerced until the contingency happened, and the **plan of composition** was finally concluded. In the case at bar, the status of the assenting bondholders changed unconditionally and irrevocably in 1937 when some 87% surrendered their "old bonds" free of any contingency, and accepted their new bonds unconditionally and irrevocably. They became creditors holding debts of a different class for a smaller amount, and their claims for the purposes of any subsequently submitted **plan of composition** must be considered as they existed when that **plan of composition** was offered; namely, January 28, 1939, and not as they had previously existed before being scaled-down and declassed in 1937. So, too, the question of the solvency or insolvency of the City of Sanford and the ability of that City to pay its debts must be determined upon the basis of the claims against the City as they existed at the date upon which the **plan of composition** under the Bankruptcy Act was presented to the Court (January 28, 1939), and not on the basis upon which they may have existed at the date of the proposal of the **voluntary plan of adjustment,** (early 1937).

(4) That 83(j) is not applicable because the plan proposed must be considered either as of date February 1, 1937, in which case it was not a **plan of composition,**

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(1) 82 Fed. (2) 186, In re: Nine North Church St.
96 Fed. (2) 85, In re: City of West Palm Beach.
109 Fed. (2d) 313, St. Louis Union Trust Co. v. Champion Shoe Machinery Co.
87 Fed. (2d) 395, Texas Hotel Co. v. Waco Dev. Co.

because (a) as there was no Municipal Bankruptcy Act in effect on February 1, 1937, it could not have been a **plan of composition** under the Bankruptcy Act, (b) it did not contemplate the submission to or approval by any court, (c) it did not contemplate coercion of the minority and (d) it did not contemplate collective action, but individual action; or else as of date January 28, 1939, in which case those bondholders who had already accepted the **plan of voluntary adjustment** and unconditionally surrendered their **"old bonds"** were not affected by the plan and 83(j) does not purport to change those provisions of the Act which require the consent of 51% of the bondholders affected by the plan.

(5) That the rule long ago laid down and uniformly followed by this Court is that:

> "Words in a statute ought not to have a retroactive operation unless they are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislation cannot be otherwise satisfied."[2]

and that when this rule is applied to the language of 83(j), it is plain that that section of the Bankruptcy Act was not intended to be retrospective or retroactive, or to go back beyond the date of the adoption of the statute, or to convert a voluntary, non-coercive, non-judicial **plan of adjustment** conceived and submitted before the passage of the amendment into a live **plan of composition** embodying coercive features and contemplating judicial action.

(6) That if 83(j) be construed as applicable to the

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(2) U. S. v. Heth, 3 Cranch 398, 413, 2 L. Ed. 479;
Crigler v. Alexander, 33 Gratt. (Va.) 677.
Seaboard Steel Casing Co. v. Trigg, 124 F. 75.
Shreveport v. Cole, 129 U. S. 36.
City R. Co. v. Citizens Ry. Co., 166 U. S. 557.
Auffm'ordt v. Rasin, 102 U. S. 620.
Holt v. Henley, 232 U. S. 637.
Arctic Ice Machine Co. v. Armstrong, 192 Fed. 114.
In Re: United States Restaurant & Realty Co., 187 F. 118.

case at bar and as taking away from the non-assenting holders of the "old bonds" their unscaled-down rights, and without the consent of the majority of said old scaled-down holders of "old bonds", reducing them to the level of the assenting and scaled-down bondholders, and be construed as permitting the consents of the scaled-down bondholders of "refunding bonds" to coerce the unscaled-down and different-righted holders of "old bonds" into being bound by a **plan of composition** to which such holders of "old bonds" have not consented, it is void as not permissible legislation which is incompatible with fundamental law and which deprives the unscaled-down holders of "old bonds" of due process, in violation of the protective provisions of the Constitution of the United States, particularly Amendment Five. If the statute baldly permitted some 4,000 holders of bonds for the principal sum of $1000 each by their votes to compel 240 non-assenting holders of bonds for the principal sum of $1040 each to accept a plan of composition which gave each of the 4,240 bondholders identical bonds of $1000 each, this Court would undoubtedly brand that statute as unconstitutional. Stripped of its camouflaging detail, that is precisely what the plan now before the Court contemplates doing. Petitioners' position is that this may not be done either (a) because 83(j) does not authorize it, or (b) because if 83(j) does authorize it, 83(j) is unconstitutional.

VI.

REASONS SUGGESTING NECESSITY FOR ISSUANCE OF WRIT

The following reasons indicate that the points involved in this case are sufficiently important to justify the issuance of the writ of certiorari:

(a) The questions involved are important questions

of Federal law arising under the recent amendments to the Federal Bankruptcy Act, which have not been but should be settled by this Court.

296 U. S. 280-287, *Del Vecchio v. Bowers.*

220 U. S. 547-548, *U. S. v. Rimer.*

257 U. S. 506-516, *International Railway v. Davidson.*

242 U. S. 430-434, *Furness, Withy & Co. v. Yangtsze Ins. Assn.*

306 U. S. 86-102, *Mackay Radio & Tel. Co. vs. Radio Corporation.*

166 U. S. 506-520, *Forsythe v. City of Hammond.*

The questions as to the construction, application, and constitutionality of Section 83(j) of the Bankruptcy Act directly affect a large number of municipalities and counties (under the very recent amendment to the Bankruptcy Act, being the Act of June 28, 1940, 438, 3rd Session, Public 669, 76 Congress, H. R. 9139, 11 U. S. C. A. 401) throughout the country which have partially completed their voluntary plans of adjustment and which are now undoubtedly awaiting a decision of this Court before proceeding further. There are at present at least four municipalities in Florida, one of which (the City of Homestead) is now a respondent in an application to this Court for a certiorari, which involves substantially similar questions, and a number in California which are in situations similar to the Cities of Sanford and Homestead, and there are a large number of counties in Florida which are similarly situated.

Moreover, the matter is of paramount importance to that large group of people constituting the investors and traders in municipal bonds, among whom perhaps the most important are the great nationwide life insurance companies whose portfolios are heavy with municipal bonds.

(b) The decision is in conflict with the decisions of the Supreme Court of Florida on a question of local law, as follows:

(1) In *State Ex Rel Garland vs. City of Palm Beach,* 193 So. 297, the Supreme Court of Florida held that the holders of refunding bonds, issued by a Florida municipality under the statute utilized in its voluntary refunding plan by the City of Sanford, had materially different rights from the rights of the holders of the non-assenting old bonds, in that, among other things, the holders of the old bonds could not enforce the payment of the principal and interest of those old bonds from money held in the sinking fund created for the refunding bonds under the provisions of the refunding statute. This necessarily conflicts with the decision here complained of, which holds that both the old bonds and the refunding bonds are in the same classification, so that the consents of the refunding bonds may be used to coerce the non-assenting old bonds.

(2) The decision of the Circuit Court of Appeals complained of is based upon the theory that the City of Sanford could have revoked its voluntary adjustment plan and could have reinstated the *status quo ante* as to the bonds which had accepted that plan. The Court said in part, 112 Fed. (2d) 437: (R. 168)

> "If the City and the assenting bondholders, because of failure to secure full consenting, concluded to revoke the plan and to restore the bonded indebtedness to its original condition, it could hardly be contended, we think, that appellant could assert a vested right to prevent their doing so."

and on page 438: (R. 169)

> "Nothing in the acceptance prevents the City and the acceptors from undoing the whole plan."

As we have pointed out *supra*, page 6, this ruling is in direct conflict with (a) the statutes of Florida, (b) the decisions of the Supreme Court of Florida, (c) the charter of the City of Sanford, and (d) the provisions of the plan of voluntary adjustment as propounded by the City of Sanford.[1]

(c) The decision is in conflict with the decisions of the Circuit Court of Appeals of other Circuits, as follows:

> (1) As we have shown above, the decision here complained of gives a retrospective and retroactive effect to a Federal statute, in contravention of the general rule laid down in this Court in the case of *U. S. v. Heth*, 3 Cranch 398, the Circuit Court of Appeals of the Third Circuit in the case of *Arctic Ice Machinery Co. v. Armstrong*, 192 Fed. 114, and the decision of the Circuit Court of Appeals of the Second Circuit in *In Re: U. S. Restaurant & Realty Co.*, 187 Fed. 118, to the effect that:
>
> > "Words in a statute ought not to have a retroactive operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature can not be otherwise satisfied."
>
> (2) The ruling here that the holders of "refunding bonds", which will not be affected by the consummation of the plan, are in the same class as are the holders of "old bonds", which will be affected by the plan, and that the consent of the

(1) Chapter 15,772, Florida Laws 1931, Section 8.
190 So. 774, City of Miami v. State.
Carlton v. State of Florida, et al., 192 So. 913
Chapter 9897, Laws of Florida 1923 (Special Acts Vol. 2) Sec. 123, R. p. 41 and 46, 3, 23, 75.

See also:
Texas Hotel Co. v. Waco Dev. Co., 87 Fed. (2d) 395.
Continental Ins. Co. v. La. Del. Ref. Co., 89 Fed. (2d) 333.

holders of "refunding bonds" can be counted as acceptors in order to coerce the holders of non-assenting "old bonds", is in conflict with the analogous ruling of the Circuit Court of Appeals of the Second Circuit in the case of *In Re: Nine North Church Street*, 82 Fed. (2d) 186.(1) Compare 96 Fed. (2d) 85-86, *In Re: City of West Palm Beach*. As shown *supra*, 83(j) may not be used as a justification for this conflict.

(d) The Circuit Court of Appeals has so construed the Federal statute as to make it so grossly unreasonable as to be incompatible with fundamental law. Such a construction makes the statute unconstitutional, as not permissible legislation in violation of the Fifth Amendment; and such a construction, coupled with a failure to declare the statute unconstitutional, is necessarily in conflict with the applicable decisions of this Court.

(1) As has been pointed out *supra*, page 7, the holders of "refunding bonds" are in no wise affected by the proposed plan. To permit them by their votes, over the protest of non-assenting holders of "old bonds", to take away from such holders of "old bonds" their substantive rights is beyond the scope of permissible Federal legislation.(1)

(2) So, too, the question of the solvency or insolvency of the City of Sanford, and the ability of that City to pay its debts must be determined upon the basis of the claims against the City as they existed at the date upon which the **plan of composition** under the Bankruptcy Act was presented to the Court (January 28, 1939) and not

(1) In the case of In Re: Nine North Church Street, the Court said:

"Before the debtor came into existence, some of the certificate-holders had consented to a reduction of their rights. The plan as proposed by the debtor did not further reduce these modified rights, while it did cut down the rights of those who had not cooperated in Gedex' proposition. Either there were two classes of creditors, with no consents from the second class (as required by §77B (e) (1), 11 U. S. C. A. §207 (e) (1), or

on the basis on which they may have existed at the date of the proposal of the **voluntary plan of adjustment** (early 1937). Arbitrarily using for that purpose the "refunding bonds" on January 28, 1939, not at the shrunken figures which had been irrevocably accepted at that date, but at the expanded figures of early 1937, is an invasion of the substantive rights of the non-assenting bondholders and deprives them of due process.

(e) The Circuit Court of Appeals has decided Federal questions in a way probably in conflict with the applicable decisions of this Court.

(1) *U. S. v. Heth*, 3 Cranch 398; 129 U. S. 36, *Shreveport v. Cole.*

(2) *Case v. Los Angeles Lumber Co.*, 308 U. S. 106.

(3) 186 U. S. 181, *Hanover Bank v. Moyses;*
295 U. S. 330, *R. R. Retirement Bd. v. Alton R. R.;*
137 U. S. 692, *Caldwell v. Texas.*

WHEREFORE, your petitioner respectfully prays that a writ of certiorari do issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a transcript of the record and proceedings herein, and that the decree herein of the said Circuit Court of Appeals, Fifth Circuit, be reversed by this Honorable

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there was a single class of creditors, with no reduction made in the rights of some of these, those certificate holders whose rights were already modified."

See also:

St. Louis Union Trust Co. v. Champion Shoe Machinery Co., 109 Fed. (2d) 313, CCA 8th.

87 Fed. (2d) 395, Texas Hotel Co. v. Waco Dev. Co.

(1) Hanover Bank vs. Moyses, 186 U. S. 181:
"Congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law."

R. R. Retirement Board v. Alton R. R., 295 U. S. 330; dealing

Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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with the Retirement Act provision in favor of previously discharged railroad employees, the Court said:

> "This clearly arbitrary imposition of liability to pay again for services long since rendered and fully compensated is not permissible legislation. The Court below held the provision deprived the railroads of their property without due process and we agree with that conclusion. Here again the petitioners insist that the requirement is appropriate because they say it does not demand additional pay for past services, but expenditure 'for a present and future benefit through improvement of the personnel of the carriers'. But the argument ends with mere statement. Moreover, if it were correct in its assumption, which we shall presently show it is not, nevertheless, there can be no constitutional justification for arbitrarily imposing millions of dollars of additional liabilities upon the carriers in respect of transactions long closed on the basis of cost with reference to which their rates were made and their fiscal affairs adjusted."

Caldwell v. Texas, 137 U. S. 692:

> "and due process is so secured by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."

See also:

Case vs. Los Angeles Lumber Products Co., 308 U. S. 106.

Kansas City Terminal R. R. Co. v. Central Union Trust Co., 271 U. S. 445.

Continental-Illinois Bank & Tr. Co. vs. C. R. I. & P., 294 U. S. 648.

Respectfully submitted,

AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE,

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Of Counsel.

August, 1940.

Supreme Court of the United States

OCTOBER TERM 1940.

No. 323

AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE,

Petitioner.

versus

CITY OF SANFORD, FLORIDA, ET AL.

Brief on Behalf of American National Bank of Nashville, Tennessee, Petitioner, for Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit.

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Supreme Court of the United States

OCTOBER TERM 1940.

No.

AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE,

Petitioner.

versus

CITY OF SANFORD, FLORIDA, ET AL.

Brief on Behalf of American National Bank of Nashville, Tennessee, Petitioner, for Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit.

I. *RELIEF SOUGHT*

This brief is filed in support of the petition of American National Bank of Nashville, Tennessee, for a certiorari to the United States Circuit Court of Appeals, Fifth Circuit, to review its judgment rendered May 31, 1940, (R. 165-172), rehearing refused July 8, 1940, 112 Fed. (2d) 435, affirming an order of the United States District Court for the Southern District of Florida (R. 153).

II. *BASIS OF JURISDICTION OF THIS COURT*

The jurisdiction of this Court is asserted under Judicial Code §204 and §262, as amended, U.S.C.A. Title 28,

Section 347 and 377; Chapter IV, Sec. 24(c) Bankruptcy Law, as amended (Chandler Act) U. S. C. A. Title 11, Sec. 47, and Rule 38 of this Court.

239 U. S. 11, *Central Trust v. Lueders.*
191 U. S. 115, *Holden v. Stratton.*

III. *CONCISE STATEMENT OF CASE*

After the first Municipal Bankruptcy Act had been declared unconstitutional and before the adoption of the present Municipal Bankruptcy Act, or Section 83(j) thereof, the City of Sanford (R. 23) offered to any of its bondholders willing to accept same, regardless of acceptance or rejection by others a **plan of voluntary adjustment** under which the accepting bondholders were to surrender and cancel their "old bonds" and coupons and accept new bonds, having materially different rights. This plan was not and could not have been a composition under the Bankruptcy Act, but was a ***voluntary adjustment plan.*** Some 87% of the bondholders accepted this offer, surrendered and cancelled their "old bonds" and accepted new bonds for scaled-down amounts (R. 3, 7). The restoration of these bondholders to the *status quo ante* was prohibited (1) by the Florida law, (2) by the decisions of the Supreme Court of Florida, (3) by the charter of the City of Sanford and (4) by the **voluntary adjustment plan** (Vid. *infra,* p. 5). Unfortunately the Circuit Court of Appeals fell into error on this point and believed erroneously that the Florida law permitted the restoration to the *status quo ante* (Vid. *infra,* p. 8). Thus at the date of the adoption by Congress of the second Municipal Bankruptcy Act, the municipal indebtedness of the City of Sanford really consisted of two series of bonds,—**first,** outstanding "old bonds" and **second,** outstanding "refunding bonds". The rights of the two series were materially different.

With its indebtedness in this position, the City of Sanford, after the adoption of the second Municipal Bankruptcy Act (Chandler Act) and after the adoption of the amendment thereof contained in Section 83(j) *supra*, filed a petition (R. 1-81, incl.) for a composition of its debt under Chapter X of the Bankruptcy Act (Chandler Act). This **plan of composition** did not propose to change in any manner whatever the rights of the holders of the "refunding bonds" as they then existed, but did propose to change matrially the rights of the holders of the "old bonds", who had refused to refund. The Chandler Act(1) requires the bankruptcy petition to show that the creditors of the petitioner owning not less than 51% in amount of the securities **affected by the plan** have accepted it in writing. The City of Sanford in an effort to meet this jurisdictional prerequisite, attached to its petition the written consents of a large number of the holders of "refunding bonds". By stipulation, only one such consent has been printed. (R. 82). The consents so obtained do not amount to 51% of the non-assenting **"old bondholders"** who **are** materially affected by the plan (not one single non-assenting old bondholder has consented), but they do amount to 51% of the total outstanding bonded indebtedness, including the holders of

(1) The Chandler Act contains the following provisions:
USCA Title 11, §402

"The term 'security affected by the plan' means a security as to which the rights of its holder are proposed to be adjusted or modified materially by the consummation of a composition agreement."

§403:

"The petition shall state that a plan of composition has been prepared, is filed and submitted with the petition, and that creditors of the petitioner owning not less than 51% in amount of the securities affected by the plan (excluding, however, any such securities owned, held or controlled by the petitioner), have accepted it in writing. * * *

"No creditor shall be deemed to be affected by any plan of composition unless the same shall affect his interest materially, and in case any controversy shall arise as to whether any creditor or class of creditors shall or shall not be affected, the issue shall be determined by the judge, after hearing, upon notice to the parties interested."

the "refunding bonds" who **are not** at all affected by the plan, and the holders of the **"old bonds"** who **are** materially affected by the plan. The City of Sanford contended that this petition was made legally sufficient by the provisions of the amendment contained in 83(j) of the Bankruptcy Act.(1)

To this petition, the American National Bank, petitioner herein, and two other non-assenting bondholders made timely objection, challenging the sufficiency of the petition as a matter of law, asserting that the consent of 51% of the creditors materially affected by the plan was jurisdictionally essential but had not been given or averred, and asserting that Section 83(j) of the Bankruptcy Act was not applicable, and if held applicable, was unconstitutional. The Attorney General of the United States was notified and his office filed a brief and made an oral argument herein. The Bank moreover asserted (R. 109, *et seq.*) that it was the holder of more than 50% of the unrefunded or **"old bonds"**, which alone were affected by the proposed plan,(2) that it had not consented to the plan. The prayer was that the City's petition should be dismissed for failure to show, as required by the statute, that the 51% of the securities affected by the plan had accepted it in writing. This application to

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(1) 83(j):

"The partial completion or execution of any **plan of composition** as outlined in any petition filed under the terms of this title by the exchange of new evidences of indebtedness under the plan for evidences of indebtedness covered by the plan, whether such partial completion or execution of such **plan of composition** occurred before or after the filing of said petition, shall not be construed as limiting or prohibiting the effect of this title, and the written consent of the holders of any securities outstanding as the result of any such partial completion or execution of any **plan of composition** shall be included as consenting creditors to such **plan of composition** in determining the percentage of securities affected by such **plan of composition.**"

(2) Petitioner's claim was for $152,000 and the total unscaled and unrefunded old bonds outstanding amounted to the principal sum of $246,000.

dismiss, after hearing before a Master, was denied by the District Court (R. 153) and from the affirmance of this decree by the Fifth Circuit Court of Appeals (112 Fed. (2d) 435) this application for certiorari is prosecuted.

IV. *ASSIGNMENTS OF ERROR*

(1) The Court of Appeals erred in holding that "nothing in the acceptance (of the plan of voluntary adjustment) prevents the City and the acceptors from undoing the whole plan", since (a) the statutes of Florida, (b) the decisions of the Supreme Court of Florida, (c) the City charter of Sanford, and (d) the express provisions of the "plan of voluntary adjustment", all prohibit restoration of the *status quo ante.*

(2) The Court of Appeals erred in holding that Section 83(j) of the Municipal Bankruptcy Act is applicable not only to a partially completed **"plan of composition"**, but also to a partially executed **"plan of voluntary adjustment"**, although said **"plan of voluntary adjustment"** was (a) executed irrevocably by a large majority of the bondholders at a time when there was no Municipal Bankruptcy Act in existence; (b) did not contemplate submission to or approval by any Court; (c) contemplated no coercion of non-assenting minority bondholders; and (d), did not contemplate collective action, but was offered to and accepted by individual bondholders, each being permitted to act and acting finally and irrevocably for himself, regardless of the action of the other bondholders.

(3) The Court of Appeals erred, as a matter of law, in failing to hold that holders of "old bonds" and holders of "refunding bonds" are in different classifications and hence consents of one class may not be used to coerce

members of the other class, although the Supreme Court of Florida, 193 So. 297, *State ex rel Garland v. City of West Palm Beach* has expressly held that they are payable from different funds and although Sec. 83(b) as amended by the Act of Congress approved June 28, 1940, expressly requires such separate classification.

(4) The Court of Appeals erred in ruling that the written acceptances of holders of "refunding bonds" who are in no wise affected by the **"plan of composition"** can be considered in computing the 51% of acceptances required by the Municipal Bankruptcy Act, §83(a); (11 U. S. C. A. §403).

(5) The Court of Appeals erred in ruling that holders of "old bonds", being creditors of a class whose rights are materially adversely affected by a proposed **"plan of composition"**, may be coerced into accepting that **"plan of composition"** by holders of "refunding bonds", being creditors of a different class, whose rights are in no wise affected by the proposed **"plan of composition"**.

(6) The Court of Appeals erred in failing to hold (a) that if the plan sought to be confirmed was the plan of February 1, 1937 (R. 23), it was not a plan of composition within the meaning of the Bankruptcy Act or of Section 83(j); (b) that if the plan was the plan of January 28, 1939 (R. 1), the holders of the "refunding bonds" were not creditors affected by the plan, and their consents cannot be used to coerce creditors who are affected by the plan and who are in a different classification.

(7) The Court of Appeals erred in holding that Section 83(j) of the Bankruptcy Act (U. S. C. A. Title 11, §403(j) should be construed as having retroactive

application to securities received and rights abandoned before its adoption.

(8) The Court of Appeals erred in failing to hold that if Section 83(j) of the Bankruptcy Act be construed as applicable to the case at bar and as authorizing creditors, whose rights are unchanged by a **"plan of composition"**, to compel acceptance of that plan by creditors whose rights are materially curtailed by that plan, it is null and void as being in violation of the provisions of the Federal Constitution, particularly Amendment V.

Assignment No. (1).

> The Court of Appeals erred in holding that "nothing in the acceptance (of the plan of voluntary adjustment) prevents the City and the acceptors from undoing the whole plan", since (a) the statutes of Florida, (b) the decisions of the Supreme Court of Florida, (c) the City charter of Sanford, and (d) the express provisions of the "plan of voluntary adjustment", all prohibit restoration of the *status quo ante.*

The Court of Appeals in its opinion (R. 165), 112 Fed. 437 and 439, said:

Page 438:

> "Nothing in the acceptance prevents the City and the acceptors from undoing the whole plan."

Page 437:

> "If the City and the assenting bondholders, because of failure to secure full consenting, concluded to revoke the plan and restore the bonded indebtedness to its original condition, it could hardly be contended, we think, that appellant

could assert a vested right to prevent their doing so."

In so holding, the Court is in direct conflict with:

(1) The statutes of the State of Florida,

(2) The decisions of the Supreme Court of the State of Florida,

(3) The City charter of the City of Sanford, and

(4) The express provisions of the plan of voluntary adjustment.

Thus:

(1) The Florida statute under which the **"refunding bonds"** were issued, namely, Chapter 15,772 of the Laws of Florida, 1931, Section 8, permits bonds to be exchanged: (See Appendix, p. 46).

> "for not less than an equal principal amount and for accrued interest of debts to be retired thereby",

and Section 14 provides that:

> "The principal and accrued interest of the refunding bonds shall not exceed the amount of the obligations refunded."

Therefore, when the 87% of the bondholders accepted **"refunding bonds"** for the scaled-down amounts, which they did irrevocably and unconditionally, thereby becoming creditors of the City of Sanford for the scaled-down amounts only, they were precluded from being reinstated as creditors for the original and larger amounts, since in order to reinstate them, any **"refunding bonds"** given them would necessarily be for a sum which would "exceed the amount of the obligations refunded."

(2) The Supreme Court of the State of Florida, in the case of *City of Miami vs. State*, 190 So. 774, said:

> "To prevent an unlawful indebtedness, no interest coupons shall be paid or left on bonds exchanged or sold by the municipality, except for interest at the bond rate from the date of the exchange or of the sale, payment and delivery of the refunding bonds; and interest on the refunded bonds should be paid only to the date of the exchange or of the purchase and delivery of the bonds for redemption; and there should be cancelled and retired all interest coupons except the current coupons on refunding bonds prior to the date of exchange or to the payment for the sale and delivery of the refunding bonds. Interest to the date of exchange or to sale, payment and delivery, represented by current coupons on the refunding bonds when they are exchanged or delivered on sale and payment, should be credited on the current coupons at delivery. When bonds are purchased for redemption, cancellation and retirement, interest thereon should be paid only to the date of delivery; and all current and future interest coupons that should be thereon, should be delivered with the refunded bonds, and both bonds and coupons should be duly listed of record and canceled and permanently retired from circulation or any other use whatever."

In the present instance, the **original bonds** were surrendered in exchange for **"refunding bonds"** by the 87% of the bondholders, and **"refunding bonds"** disclaiming past due interest and bearing future interest at a different rate were accepted unconditionally by them. Under the ruling of the Court, the original bonds were required to be "cancelled and permanently retired from circulation or any other use whatever".

(3) The charter of the City of Sanford, Chapter

9897 of the Laws of Florida, 1923, Special Acts Vol. 2, contains as Section 123 a section reading as follows:

> "Section 123. The City Commission in its corporate capacity is authorized to issue from time to time bonds of the City of such denominations, bearing such rate of interest, not to exceed six (6) per cent, and becoming due in such time and upon such conditions as may be determined, for any and all municipal purposes mentioned in this Act, and for such other lawful municipal purposes as may be determined by Ordinance; provided, however, that (except as otherwise provided in this Act) before the issue of any bonds shall be made, an ordinance shall be passed expressing in exact terms the amount of the bond issue and purpose for which such monies to be realized are to be used, which said ordinance proposing the issue of bonds shall subsequently be approved by a majority vote of the electors of the City, who are qualified to vote, as shown by the registration books of the City, voting at an election held for that purpose, at such time and in such manner as may be prescribed by law, and the City ordinances; and, provided further, that the aggregate issue of bonds outstanding and unpaid shall at no time exceed fifteen (15) per cent of the assessed valuation of the real and personal property of the municipality, as shown by the assessment roll of the municipality. The question of the issuance of bonds for any specific purpose may be submitted from time to time, not oftener than once each year, with relation to each purpose specified."

This *per se* would prevent a reconstitution or restoration of the old indebtedness.

(4) The City of Sanford's voluntary adjustment offer (R. 23, *et seq.*) provides in part:

R. 41:

> "Section 6. Upon delivery of the refunding bonds in exchange for outstanding bonds, all past due coupons, if any, shall be detached from the refunding bonds and cancelled by the City, and all unmatured coupons shall be attached thereto."

This was done.

R. 46:

> "Section 15. The refunding bonds authorized hereby when executed shall be delivered to the holders of the outstanding bonds to be refunded thereby and/or the holders of judgments thereon in exchange for and upon surrender of an amount of such bonds and/or the satisfaction of any judgment obtained upon a principal amount of such bonds equal to the face amount of the refunding bonds exchanged therefor."

This was done, and when the City of Sanford (R. 1, *et seq.*) filed its **plan of composition,** it listed the "refunding bonds" not at the amount of the "old bonds", but at the scaled-down amount of the "refunding bonds."

Moreover, the City of Sanford's resolution adopted after the passage by Congress of the second Municipal Bankruptcy Act is in the Record, 75, *et seq.*, and provides:

R. 75:

> "Whereas, on the first day of February, 1937, the City of Sanford, Florida, had outstanding debts in the principal amount of $5,900,000, evidenced by bonds and judgments, * * * and on said 1st day of February, 1937, adopted a plan * * * which said plan was embodied in resolution No. 499 * * * and which resolution provided that said refunding bonds, Series A, should be issued in exchange for the principal of all of the outstanding

bonds of said City of Sanford * * *.

"Whereas, said plan * * * has been partially completed by the exchange of refunding bonds of Series A.

* * * * *

"Whereas, said City of Sanford now has outstanding the aforesaid refunding bonds, Series A, in the aggregate principal sum of $4,923,000 and the aforesaid refunding bonds, Series B, in the aggregate principal sum of $593,000, and the aforesaid bonds in the aggregate principal sum of $250,000, hereinbefore particularly described and which have not been exchanged for refunding bonds."

The petition of the City of Sanford to the Bankruptcy Court recites, R. 3:

"and said plan of composition was accepted by the holders of all of petitioner's said bonded indebtedness except the holders of the bonds hereinafter specifically described, and pursuant to the terms of said plan of composition adopted on the 1st day of February, 1937, petitioner has exchanged the aforesaid refunding bonds, Series A, for all of petitioner's bonded indebtedness except the following:"

(Here follows a list of the non-assenting bonds).

Page 7:

"Petitioner further respectfully shows and represents unto the Court that it has a total outstanding indebtedness consisting of refunding bonds, Series A, in the principal sum of $4,908,000, bearing interest as aforesaid, and a total outstanding indebtedness consisting of refunding bonds, Series B, in the principal sum of $593,000, bearing interest as aforesaid, and the aforesaid bonded indebtedness hereinbefore particularly described for which refunding bonds,

Series A and B, have not been exchanged, amounting to the principal sum of $231,000 of bonds, for which refunding bonds, Series B, may be exchanged; that all of the aforesaid bonds are general obligations of petitioner".

It appears from the foregoing that the Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions", and that under Rule 38(b) of this Honorable Court, a certiorari should issue. The point is of grave importance, since it is the only basis upon which holders of refunded bonds can possibly claim any interest in the plan of January 28, 1939.

Assignment No. (2).

The Court of Appeal erred in holding that 83(j) of the Municipal Bankruptcy Act is applicable not only to a partially completed **plan of composition**, but also to a partially executed **plan of voluntary adjustment,** although said **"plan of voluntary adjustment"** was (a) executed **irrevocably** by a large majoritty of the bondholders at a time when there was no Municipal Bankruptcy Act in existence; (b) contemplated no coercion of non-assenting bondholders; (c) contemplated no submission to or approval by any Court; and (d) did not contemplate collective action, but was offered to and accepted by individual bondholders, each being permitted to act and acting finally and irrevocably for himself, regardless of the action of the other bondholders.

Section 83, U. S. C. A. Title 11, paragraph 403, (j), reads:

> "The partial completion or execution of any **PLAN OF COMPOSITION** as outlined in any petition filed under the terms of this title by the exchange of new evidences of indebtedness under the plan for evidences of indebtedness covered by the plan, whether such partial completion or execution of such **PLAN OF COMPOSITION** occurred before or after the filing of said petition, shall not be construed as limiting or prohibiting the effect of this title, and the written consent of the holders of any securities outstanding as the result of any such partial completion or execution of any **PLAN OF COMPOSITION** shall be included as consenting creditors to such **PLAN OF COMPOSITION** in determining the percentage of securities affected by such **PLAN OF COMPOSITION.**" (Emphasis by present writers).

The Court can not fail to observe how meticulously careful the lawmakers were in confining the application of Section 83(j) to a **"plan of composition"**. This meticulous care was undoubtedly due, in part, at least, to the fact that this Court had set aside in the *Ashton* case, 298 U. S. 513, the original Municipal Bankruptcy Act, which was bottomed on the general bankruptcy powers, and had affirmed in the *Bekins* case, 304 U. S. 27, the constitutionality of the second Municipal Bankruptcy Act, which was expressly bottomed on the **composition power.** Thus, the second sentence of the opinion of this Court reads:

> "They present the question of the constitutional validity of the Act of August 16, 1937, 50 Stat. 653, amending the Bankruptcy Act by adding Chapter 10, providing for **the composition of indebtedness** of the taxing agencies or instrumentalities therein described." (304 U. S. 45).

The *Ashton* case, which held the original Municipal Bankruptcy Act unconstitutional, was decided May 25, 1936. Congress adopted the second Municipal Bankruptcy Act on August 24, 1937 (50 Stat. 653) and amended same by adding Section 83(j) on June 22, 1938 (52 Stat. 940). As appears from R. 2, the City of Sanford on February 1, 1937, **that is to say, at a time when the old Municipal Bankruptcy Act had been declared unconstitutional and the new Municipal Bankruptcy Act had not as yet been passed,** adopted a **plan of voluntary adjustment** of its indebtedness, which was evidenced by resolution No. 499, adopted by the City Commission on the 1st day of February, 1937, and which is set out *in extenso*, on pages 23, *et seq.* of the Record. This plan was not and could not have been a **plan of composition** under the Municipal Bankruptcy Act for the following reasons:

(1) At the time that it was propounded to and accepted by the large majority of the outstanding bondholders, there was no Municipal Bankruptcy Act in existence, and therefore, it necessarily could not have been a **plan of composition** under a Bankruptcy Act.

(2) That plan contemplated no submission to, or approval by any court.

(3) That plan contemplated no coercion of non-assenting minority bondholders by any court or by any other authority.

(4) That plan did not contemplate collective action, but expressly authorized any individual bondholder to surrender his "old bonds" and receive his "refunding bonds" regardless of any action which any other holder or holders of "old bonds" might or might not take; and as a matter of fact, some 87% of the holders of the "old bonds" surrendered their "old bonds" and received "refunding bonds". The "old bonds" were thereupon can-

celled and the new "refunding bonds" recognized as the existing obligations of the City,—so much so, that when the City subsequently, on January 28, 1939, R. 1, filed its petition in Bankruptcy and its **plan of composition,** it set up not the "old bonds," but the "refunding bonds" as its outstanding obligations.

From this it is at once apparent that the "refunding bonds" were not and are not "securities outstanding as the result of any such partial completion or execution of any **plan of composition"**, as required by Section 83(j).

A **"plan of composition"** has a well-defined and special meaning in bankruptcy parlance, which fact has been repeatedly recognized.

96 Fed. (2d) 85, *In re: City of West Palm Beach:*

> "The Municipal Bankruptcy Act speaks uniformly of a **'plan of composition'.** In bankruptcy matters, composition has a special meaning, to-wit, a settlement or adjustment which is enforced by the court on all creditors after its acceptance by a required majority. A proposed adjustment out of court is not a plan of composition, but may become one by being presented to the court. That the present adjustment was proposed and largely accepted before the Act was passed and of course not as a plan of composition, would, if it remained executory, possibly not prevent its presentation for enforcement under the Act. * * * Whether the plan must have been offered and accepted as a plan of composition rather than as a plan of voluntary adjustment we need not decide since the plan with its acceptance became incapable of presentation as a composition, because it had been largely executed."

8 *Corpus Juris Secundum*, Bankruptcy, Section 653:

> "A composition had in accordance with the

Bankruptcy Act, Section 12 (11 United States Code Annotated, Section 30) partakes of the nature of a bargain or settlement in the **nature of a contract approved by the court,** originating usually in an offer for the debtor and resulting in the main from voluntary acceptance by a majority of the creditors, whereby the debtor agrees with his creditors to release his property from creditors' claims and secure his own discharge in return for the payment of a specified sum to be distributed ratably among the general creditors, and such sum as may be necessary to pay priority claims and costs of the proceedings. To be within the provisions of the Bankruptcy Act, the composition must be entered into by one against whom a voluntary or involuntary petition has been filed or who has been adjudged a bankrupt."

In re Merriman, 17 Fed. Cas. No. 9479:

"The differences are radical between the nature of a composition *inter partes* and of a bankruptcy composition. The root of their differences is the fact that the entire proceedings for and in a bankruptcy composition are proceedings in bankruptcy, and are a part of a system for the compulsory division of assets which is administered by a court, while a composition *inter partes* derives its validity merely from the will of the parties. These differences induced the Supreme Court of Massachusetts to declare recently that the proceedings for a composition under the statute 'differ wholly in nature and effect from a voluntary composition which binds only those executing it.' *Guild v. Butler,* (Oct., 1877) (122 Mass. 498)."

In re Bickmore Shoe Company, 263 Fed. 926:

"It cannot be successfully maintained that a composition is not a part of the bankruptcy pro-

cedure. While it depends for its effect upon an acceptance by a majority in number and amount of the creditors, it is only of 'creditors whose claims have been allowed.' Section 12b. The allowance is itself court action. The composition is of no avail, unless confirmed by the court after a judicial hearing. It results, not alone in a contract between those who have assented, but in a judgment imposing its terms upon those who have not assented, and establishes consequences declared by the law independent of stipulation in the contract, such as that the title to the bankrupt's property shall revest in him, and that a discharge from his debts, with fixed exceptions, shall result.

> " 'The composition proceeding is therefore a part of the proceeding in bankruptcy, and one of the modes which the bankrupt law authorizes of releasing the debtor and securing to his creditors an equal share of his means. * * * As we have * * * said, these several statutes, sections, and provisions are to be construed as parts of one entire system of bankrupt law.' "

In the case of *First National Bank of St. Albans v. Wood*, 53 Vt. 491, the court held that a composition agreement was part of the proceeding in bankruptcy, and stated:

> "The grounds of distinction between this case and that of an ordinary compromise agreement between debtor and creditors as in *Paddleford v. Thacher*, 48 Vt. 574, are numerous and obvious.
>
> "The latter is a proceeding not in court, or the subject of judicial determination before its validity is established, but rests purely in contract and is dependent upon the agreement of creditors, their mutual promises as between each other constituting the consideration of each. A creditor votes to accept a proposition of composi-

tion in bankruptcy, not upon condition that all the other creditors will do the same, but because he believes he will get more money on his debt by a settlement under the composition provisions of the statute than through the intervention of an assignee. There is no consideration for his vote. It is simply his expression of preference as between two methods of settlement of the estate, the action of the court being alike necessary to effectuate either. An affirmative vote of all creditors is not required in any case; and if all vote affirmatively the court is not necessarily bound by it, but it 'may refuse to accept or confirm the composition.' * * * It is the action of the court that finally operates the discharge, and there would be none without such action."

Assignment No. (3).

The Court of Appeals erred as a matter of law in failing to hold that holders of "old bonds" and holders of "refunding bonds" are in different classifications and hence consents of one class may not be used to coerce members of the other class.

There is no controversy as to the facts in this matter. The record affirmatively shows (R. 23, *et seq.*) that on February 1, 1937, the City of Sanford adopted a resolution propounding a plan for the **voluntary adjustment** of its bonded indebtedness. That plan was offered to each bondholder as an individual and under it, each bondholder was entitled to surrender his "old bond" for cancellation and to accept irrevocably his new bond. At R. 27 and 28, it affirmatively appears that the new bondholder surrendered his claim to past due interest which had accrued prior to March 1, 1937, and agreed to accept for the future a different and reduced schedule of inter-

est. It moreover appears from the decision of the Supreme Court of Florida in the case of *State ex rel Garland v. City of West Palm Beach,* 193 So. 297, a case arising under this same Chapter 15,772 of the Acts of 1931, that that Court expressly held that the holder of "old bonds" who refused to exchange them for new bonds could not insist upon the payment of the principal and interest thereon from moneys in the sinking fund provided for the payment of the principal and interest of the new bonds, since that was a special fund dedicated to the payment of the new bonds. This clearly demonstrates that the rights of the holders of the **"old bonds"** are materially different from the rights of the holders of the **"refunding bonds"**, and that the two sets of bonds are necessarily in separate classifications. Headnote No. 1 to that decision reads

> "1. Municipal corporations—951
>
> Where City of West Palm Beach issued refunding bonds for purpose of exchange and to take place of outstanding bonds which were supported by a tax levy sufficient to pay them as they matured, and refunding bonds were supported by a sinking fund, a holder of outstanding bonds who refused to exchange them for refunding bonds could not enforce payment of principal and interest of outstanding bonds from money held in the sinking fund created for the refunding bonds. Acts 1931, Ex. Sess., c. 15772; Sp. Acts 1933, c. 16758."

When this is compared with the language of the amendment to Section 83(b), which is embodied in the Act of Congress approved June 28, 1940, and reported in U. S. Code Congressional Service Advance Sheets No. 6, at page 655, and which reads as follows:

> "Provided, however, That the holders of all claims regardless of the manner in which they are

> evidenced, which are payable without preference out of funds derived from the same source or sources, shall be of one class. The holders of claims for the payment of which specific property or revenues are pledged, or which are otherwise given preference as provided by law, shall accordingly constitute a separate class or classes of creditors."

the error into which the Circuit Court of Appeals fell in failing to hold that the two sets of bondholders are in different classifications is emphasized.

As the class of refunding bondholders is separate and distinct from the class of old bondholders, and as the right of the "refunding bondholders" remain unaffected by the plan, whereas the rights of the "old bondholders" are materially reduced by the plan, the use of the consents of the "refunding bondholders" to coerce the "old bondholders" would be a denial of due process.

Assignment No. (4).

> The Court of Appeals erred in ruling that the written acceptances of holders of "refunding bonds" who are in no wise affected by the **"plan of composition"** can be considered in computing the 51% of acceptances required by the Municipal Bankruptcy Act, Section 83(a); (11 U. S. C. A. §403).

The Municipal Bankruptcy Act contains the following provisions:

U. S. C. A. Title 11, §402:

> "The term **'security affected by the plan'** means a security as to which the rights of its holder are proposed to be adjusted or modified materially by the consummation of a composition agreement."

§403:

> "The petition shall state that a plan of composition has been prepared, is filed and submitted with the petition, and that creditors of the petitioner owning **not less than 51% in amount of the securities affected by the plan** (excluding, however, any such securities owned, held or controlled by the petitioner), have accepted it in writing. * * *
>
> "No creditor shall be deemed to be **affected by any plan of composition unless the same shall affect his interest materially,** and in case any controversy shall arise as to whether any creditor or class of creditors shall or shall not be affected, the issue shall be determined by the judge, after hearing, upon notice to the parties interested."

There is no dispute about the fact that the "refunding bonds" are not affected in the least by the plan propounded by the petition (R. 1) filed January 28, 1939. That plan simply proposes that the **"old bonds"** be scaled down to the level of the **"refunding bonds"**. The consents which were attached to the petition filed January 28, 1939, were all consents by holders of **"refunding bonds."** Not a single **"old bond"** has consented to the plan. Permitting these consents to be considered in computing the 51% of acceptances required by the statute thus quoted is in direct violation of the provisions of the statute, since they are not in any wise **affected by the plan,** and the statute is specific in its requirement that the consents shall be consents of creditors affected by the plan.

96 F. (2d) 85, *In re City of West Palm Beach,* (C. C. A. 5th):

> "It appears from the petition that more than a majority of the floating debts involved in the plan had been exchanged for new funding bonds and about five-sixths in amount of the old bonds had been exchanged for new bonds. The owners of these were no longer acceptors of an executory

plan, but had been fully settled with under it and no longer had any direct interest in it. They could not fairly be counted as voters before the court on the propriety of the plan. Of course they would wish the non-acceptors to be forced to scale their debts as they themselves had done. They could no longer have an open mind as to whether, in the light of developments, the plan was a good one or a bad one. The binding of a minority by a majority having the same interests was discussed as respects corporate reorganizations in Texas Hotel Securities Co. v. Waco Development Co., 5 Cir., 87 F. 2d 395, and Continental Ins. Co. v. Louisiana Oil Ref. Corp., 5 Cir., 89 F. 2d 333. The importance of identity of interest is there stressed. We do not think the creditors of West Palm Beach who have already irrevocably scaled their debts can be counted either in the two-thirds finally to be needed, nor as preliminary acceptors of the scaling plan offered as a composition."

87 F. (2d) 395, *Texas Hotel Co. v. Waco Dev. Co.*, (C. C. A. 5th):

This was a case arising under Section 77 (b) of the Bankruptcy Act, but the provisions of 77(b) concerning classification are similar to the provisions in the Sections before the Court. The Fifth Circuit Court of Appeals said:

> "The right to vote on a plan is not a fixed incident of every allowed claim, but exists **only when its class is affected by the plan** and may vary as the plan is changed or modified."

82 F. (2d) 186, *in re: Nine North Church Street*, (C. C. A. 2nd), the Court said:

> "Before the debtor came into existence, some of the certificateholders had consented to a reduction of their rights. The plan as proposed by the

debtor did not further reduce these modified rights, while it did cut down the rights of those who had not cooperated in Gedex' proposition. Either there were two classes of creditors, with no consents from the second class (as required by §77B (e) (1), 11 U. S. C. A. §207, (e) (1), or there was a single class of creditors, with no reduction made in the rights of some of these, those certificateholders whose rights were already modified."

109 F. (2d) 313, *St. Louis Union Trust Co. v. Champion Shoe Machinery Co.*, (C. C. A. 8th):

> "It can be argued that, since all bonds were secured by the same pledged assets under the same trust indenture, the court below had the discretion to place all of the bondholders in a single class for purposes of reorganization proceedings, and that the appellants' only just complaint is against the plan adopted. See and compare, In re Palisades-on-the-Desplaines, 7 Cir., 89 F. 2d 214, 217; J. P. Morgan & Co. v. Missouri Pac. R. Co., 8 Cir. 85 F. 2d 351, 352. We think that the appellants' rights were sufficiently distinct from those of other bondholders to entitle the appellants and those who were similarly situated to a separate classification. See Gerdes, Corporate Reorganization, 1936, Vol. 2, §§1045-1046, pp. 1681-1682; Finletter, Principles of Corporate Reorganizations, pp. 423-424. Whether the appellants be regarded as entitled to payment before other bondholders may have recourse to the pledged assets, or as having a lien on the pledged assets superior to that of other bondholders, we think is not important. The rights of the bondholders who consented to the last extension were, by the terms of the trust indenture, subordinated to the rights of those who never consented to any extension and to the rights of those who consented only to the first extension.

Agreements of creditors to subordinate their indebtedness to that of other creditors will be given effect in bankruptcy proceedings. Bird & Sons Sales Corporation v. Tobin, 8 Cir., 78 F. 2d 371, 373, 100 A. L. R. 654, and cases cited.

"The record shows that the bonds of the appellants and of others in their situation and the bonds of those who never consented to any extension were fully secured by the assets pledged; that other bonds evidently were not; that under the plan of reorganization, which made no distinction between bondholders, the appellants and the others whose rights are superior to those of other bondholders will not receive the worth of their bonds. The plan which compels them to surrender, without adequate consideration and for the benefit of other bondholders, the superior rights which they acquired is inequitable and unfair. See and compare, In re Nine North Church Street, Inc., 2 Cir., 82 F. 2d 186; Sophian v. Congress Realty Co., 8 Cir., 98 F. 2d 499; Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 60 S. Ct. 1, 84 L. Ed. __."

89 F. (2d) 214, *In re Palisades-On-The Desplaines*, (C. C. A. 7th):

The Court said at page 217:

"There is much in appellant's contention to commend it to our serious consideration. His position is based upon the interpretation of that part of the statute here involved, by Mr. Gerdes in his work on Corporate Reorganization (1936), vol. 2, §1046, p. 682:

" 'All creditors of equal rank with claims against the same property should be placed in the same class. This is natural, logical, and a simple basis of division.

" 'Conversely, creditors of different ranks, or creditors of the same rank but with claims against different properties, should be placed

in different classes. The owners of a mortgage which is a first lien on certain property should be in a class other than one containing the owners of a mortgage which is a second lien on the same property. So, also, the holders of a mortgage, which is first lien on certain property should be in a class other than the one containing the holders of a mortgage which is a first lien on other property."

85 F. (2d) 351, *J. P. Morgan & Co. v. Missouri-Pac. R. Co.,* (C. C. A. 7th):

This was a bankruptcy proceeding under the Railroad Section 11 U. S. C. A. §205, and the Circuit Court of Appeals of the Eighth Circuit held:

"We agree with this statement of the District Court, and it follows that the classification should in no wise depend upon the nature of the claimant or his interest in the sense of his bias or leanings, but only upon the nature of the claim."

See also *Continental Insurance Co. v. La. Oil Refining Corp.,* 89 F. (2) 333.

Assignment No. (5).

The Court of Appeals erred in ruling that holders of "old bonds", if creditors of a class whose rights are materially adversely affected by a proposed **"plan of composition"** may be coerced into accepting that **"plan of composition"** by holders of "refunding bonds", creditors of a different class whose rights are in no wise affected by the proposed **"plan of composition"**.

As stated *supra* and as demonstrated by the record,

the **"plan of composition"** filed January 28, 1939, contemplates a shrinkage in the claims of the holders of **"old bonds"**. It does not contemplate any change in the status of the **"refunding bonds"**.

The statute (11 U. S. C. A. §402 and 403) provides:

> "§402. The term 'security affected by the plan' means a security as to which the rights of its holders are proposed to be adjusted or modified materially by the consummation of a composition agreement."
>
> "§403: The petition shall state that a plan of composition has been prepared, is filed and submitted with the petition, and that creditors of the petitioner owning not less than 51% in amount of the **securities affected by the plan** (excluding, however, any such securities owned, held or controlled by the petitioner), have accepted it in writing. * * *
>
> "No creditor shall be deemed to be affected by any plan of composition unless the same shall affect his interest materially, and in case any controversy shall arise as to whether any creditor or class of creditors shall or shall not be affected, the issue shall be determined by the judge, after hearing upon notice to the parties interested."

These provisions meticulously guard creditors affected by the plan against coercion by creditors of a different class who are not affected by the plan. The point is fundamental in its importance. In a composition coercion can be exerted only by parties whose interest is affected upon parties whose interest is also affected in substantially the same way. Any other form of coercion is beyond the scope of a composition and by a comparison of the *Ashton* case (298 U. S. 513) with the *Bekins* case (394 U. S. 27), it will be seen that only because it is

bottomed upon the principle of composition is the Municipal Bankruptcy Act sustained at all.

See *In re: Nine North Church Street*, 82 F. (2d) 186;

City of West Palm Beach, 96 F. (2d) 85, 86;

Texas Hotel Co. v. Waco Dev. Co., 87 F. (2d) 395;

St. Louis Union Trust Co. v. Champion Shoe Machinery Co., 109 F. (2d) 313.

Assignment No. (6).

The Court of Appeals erred in failing to hold (a) that if the plan sought to be confirmed was the plan of February 1, 1937 (R. 23), it was necessarily not a **plan of composition** within the meaning of the Municipal Bankruptcy Act or Section 83(j) thereof, (b) that if the plan sought to be confirmed was the plan of January 28, 1939 (R. 1), the holders of the "refunding bonds" were not creditors affected by the plan and their consents can not be used to coerce creditors who are affected by the plan and who are in a separate classification.

(a) As stated *supra*, the City of Sanford proposed its original **plan of adjustment** (R. 23) on **FEBRUARY 1, 1937,** at a time when there was no Municipal Bankruptcy Act in existence. That plan, therefore, could not possibly have been a **plan of composition** within the meaning of the Municipal Bankruptcy Act. Moreover, that plan did not contemplate the submission to or approval by any Court and did not contemplate coercion of any non-assenting bondholders. On the contrary, it

contemplated, and was construed and executed as contemplating individual action by each individual bondholder who was permitted to surrender his "old bonds" and to accept and receive his "new bonds" unconditionally, irrevocably and without any reference whatever to the action taken or not taken by the other bondholders. The plan, therefore, was plainly not a **"plan of composition"** and the securities received under it were, therefore, not securities received in partial execution of a **"plan of composition,"** as contemplated by Section 83(j).

(b) After some 87% of the bondholders had accepted the **plan of voluntary adjustment** of February 1, 1937, and had irrevocably and unconditionally surrendered their bonds and accepted the new "refunding bonds" on a scaled-down basis and having different rights and payable from a different fund, the City of Sanford on **JANUARY 28, 1939,** came forward with its so-called **"plan of composition."** This **"plan of composition"** did not and does not in any wise change or alter the rights of the holders of the "refunding bonds." Those "refunding bonds" are, therefore, not "affected by the plan." It does, however, materially change and shrink the rights of the holders of the "old bonds." It undertakes to coerce the holders of the "old bonds" into accepting this shrinkage by having appended to it the consents of the holders of the "refunding bonds." As those holders are not "affected by the plan," they are prohibited by the express language of the statute from having their consents used to coerce the persons who are affected by the plan.

Assignment No. (7).

The Court of Appeals erred in holding

> that Section 83(j) of the Bankruptcy Act (11 U.S.C.A. §403(j)) should not be construed as having retroactive application to securities received and rights abandoned before its adoption.

The settled rule for the interpretation of statutes is that they will not be given a retroactive operation unless it is imperative that no other meaning can be given to them. This Court states this doctrine in *U. S. v. Heth*, 3 Cranch 398, 413, 2 L. Ed. 479, as follows:

> "Words in a statute ought not to have a retroactive operation, unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied."

The Supreme Court of Virginia, in *Crigler v. Alexander*, 33 Gratt. 677, adds to the foregoing statement of law, the following:

> "And although the words of the statute may be broad enough in their liberal extent to comprise existing cases, they must still be construed as applying only to cases that may thereafter arise unless a contradictory intention is unequivocably expressed therein."

The above cases were cited and approved in the case of *Seaboard Steel Casing Co. v. Trigg Co.*, 124 Fed. 75, where the effect of an amendment to the Bankruptcy Act enacted February 5, 1903, was in question. The Court said:

> "This doctrine is definitely accepted by the courts of the United States and of this state. Indeed, the presumption is that statutes are intended to operate prospectively rather than retroactively;

and they should be so interpreted unless the act itself plainly negatives such a construction. Shreveport v. Cole, 129 U. S. 36, 9 S. Ct. 210, 32 L. Ed. 589; City Ry. Co. v. Citizens Ry. Co., 166 U. S. 557, 17 S. Ct. 653, 41 L. Ed. 1114."

In *8 Corpus Juris Secundum, Bankruptcy,* Section 11, the author says:

> "As a rule, neither the Bankruptcy Act nor the amendments thereto are retroactive in effect, and amendments to the Bankruptcy Act do not apply to cases pending at the time they become effective unless the amendatory acts clearly indicate an intention that they shall apply and then only to the extent indicated."

This Court has recognized the foregoing statement of the doctrine as applied to bankruptcy acts in the case of *Auffmordt v. Rasin,* 102 U. S. 620, 26 L. Ed. 262. There a petition in bankruptcy had been filed on February 5, 1874. The assignee in bankruptcy then sued to recover securities transferred by the bankrupt on November 15, 1873. At the time of the filing of the petition, and at the time of the transfer, the period, prescribed by the act, relating to preferences, was four months. Congress, on June 22, 1874, amended the Act so as to provide a two-months' period. The suit to recover the securities was started after the passage of the amendment and the lapse of two months was set up as a defense. The Court said:

> "It is to be observed that the full period of four months from the receipt of the securities had pased, indeed, more than six months had passed, before the enactment of this amendment, and the bankruptcy proceeding had been initiated within that period and the assignee appointed. **The rights of the parties were therefore fixed before the new**

law was passed. The assignee had a vested right to the securities, or to their value. The defendants were under legal obligation to return these securities or to pay their value to the assignee. To hold that Congress intended by this amendatory statute to take away that right of action is to hold that it intended by a retrospective statute to destroy a vested right of property or an existing right of action. **If it be conceded that Congress could do this, the principle is too well established to need the citation of authorities, that no law will be construed to act retrospectively unless its language imperatively requires such a construction."** (Emphasis ours).

Holt v. Henley, 232 U. S. 637. In this case, an attempt was made to give a retroactive effect to the June 25, 1910, amendment to the Bankruptcy Act. The Court said:

> "Before that amendment, Holt had a better title than the trustees would have got. York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 26 Sup. Ct. Rep. 481. We are of opinion that the Act should not be construed to impair it. We do not need to consider whether or how far in any event the constitutional power of Congress would have been limited. **It is enough that the reasonable and usual interpretation of such statutes is to confine their effect, so far as may be, to property rights established after they were passed.** If, as they sometimes do, the registry statute had fixed a time within which the registration must take place, and the time had elapsed, we think it clear that the amendment would not be read as attempting to diminish Holt's rights. **But the most obvious, if not the only, way of reaching that result, would be by taking the amendment to affect subsequently established rights alone. That is a familiar and natural mode of interpre-**

tation, whereas it would be highly artificial to say that it affected existing rights that still might be secured, but not those for which the chance had been lost. * * * His continuing title simply was postponed to purchasers without notice and creditors getting a lien. We are of opinion that it was not affected by the enactment of later date than the conditional sale. The opposite construction would not simply extend a remedy, but would impute to the act of Congress an intent to take away rights lawfully retained, and unimpeachable at the moment when they took their start." (Emphasis ours).

Arctic Ice Machine Co. v. Armstrong County Trust Co., 192 Fed. 114 (C.C.A. 3rd Cir.):

> "It is our opinion, however, that the clause should not receive the construction thus given it. **The contract of sale before us antedates the amendment.** The rights of the vendor and vendee were fixed by it. Under the law of Pennsylvania the reservation of title in the Arctic Ice Machine Company was good from March 22, 1909, the date of the contract of sale, to June 25, 1910, the date of the amendment, against any trustee in bankruptcy that might have been appointed for Keener Brothers. To hold that the amendment divested the vendor of its reserved title is, independent of any constitutional question, to give it a retroactive effect, not consistent with any expressed intent of Congress. The principle is too well established to be disregarded that a statute shall not, except where the legislative intent is clear, be permitted to have a retroactive effect." (Emphasis ours).

The case of *In Re: United States Restaurant & Realty Co.,* 187 Fed. 118, (C.C.A. 2nd Cir.), was an appeal by petitioning creditors from a decree refusing

to adjudicate the United States Restaurant Company a bankrupt. The restaurant company was not subject to the provisions of the Bankruptcy Act as it stood prior to the amendment of June 25, 1910. On April 7, 1910, it made a general assignment for the benefit of creditors. In so doing, as held by the court, it did not commit an act of bankruptcy because the provisions of the act in force at the time of the assignment applied only to persons who might become bankrupts. The amendment of June 25, 1910 (Section 4) for the first time brought the restaurant company within the category of possible bankrupts. The Court held:

> "The sole question in the case is whether by so doing Congress intended that an act done by the corporation which was in no way improper or obnoxious to any provision of statute when it was done should be availed of to send the corporation into the bankruptcy court, when its estate had already been put into a position where it was being administered under the insolvent laws of the state. To hold this would be to give to the amendment a retroactive effect, and we concur with the district judge in the conclusion that there is nothing in the amending statute which requires such a construction. And unless such an intention on the part of Congress is clearly expressed in the act itself, its provisions should not have a retrospective operation. U. S. v. Heth, 3 Cranch 399, 2 L. Ed. 479.
>
> "The appellant contends that the amendment merely enlarges a remedy already existing, and he cites Pond v. N. Y. National Exchange Bank, (D. C.) 124 Fed. 992, where it was held that an act conferring jurisdiction of certain suits on a court which theretofore was without such jursidiction was not confined to rights of action subsequently arising. In that case, however, rights of action theretofore existing could have been en-

> forced elsewhere. In the case at bar no creditor of the company had any existing right to throw it into bankruptcy as a consequence of its having made a general assignment."

These cases are only a few of the very numerous authorities which hold that no statute will be construed to act retrospectively unless its language imperatively requires such a construction. Amendment, Sub-section (j), contains no language making it apply to situations created in the past, nor even to cases pending at the time of its adoption. The amendment cannot be construed retroactively. To hold that the petitioner's partially executed **voluntary adjustment** (95% completed) is revived as a **plan of composition** by the amendment will mean that any municipality that at any time in the past has settled a majority of its debts through a voluntary refunding plan can now come into court and use the consents of the holders of refunding bonds to force holders of unrefunding bonds to accept its original plan. This could be even extended to a voluntary plan completely executed 10 or 20 or any number of years ago.

Assignment No. (8).

> The Court of Appeal erred in failing to hold that if Section 83(j) of the Municipal Bankruptcy Act be construed as applicable to the case at bar and as authorizing creditors whose rights are unchanged by a "**plan or composition**" to compel acceptance of that plan by creditors whose rights are materially curtailed by that plan, and as authorizing the use on Jan. 28, 1939, for the purpose of determining the solvency or insolvency of the City, the bonds voluntarily

and irrevocably shrunk on Feb. 1, 1937, not at their shrunken figures, but at the expanded figures existing prior to the voluntary shrinkage, it is null and void as being in violation of the provisions of the Federal Constitution, particularly Amendment V.(1)

If this statute baldly permitted 4,000 holders of bonds of the City of Sanford, each for the principal sum of $1,000, by their votes to compel 240 non-assenting holders of bonds of that City, each for the principal sum of $1,040, to acept a **plan of composition** which simply took the extra $40 away from each of the 240 non-assenting bondholders and gave to each of the 4,240 bondholders identical bonds of $1,000 each, this Court would undoubtedly brand that statute as unconstitutional. Stripped of its confusing detail, that is precisely what the plan now before the Court contemplates doing. At the time that the plan was presented on January 28, 1939, the City of Sanford had outstanding two classes of bondholders, one class who had bonds upon which there was due $1,000 of principal and interest from March 1, 1937, and who were entitled under the law to share in the sinking fund, and another class of bondholders each of whom had a bond for $1,000 bearing interest **from**

(1) Among the cases declaring Acts of Congress void as having violated the Fifth Amendment are the following:

Councilman v. Hitchcock, 142 U. S. 547.
Monongahela Nav. Co. v. U. S., 148 U. S. 312.
Wong Wing v. U. S., 163 U. S. 228.
U. S. v. L. Cohen Grocery Co., 255 U. S. 81.
U. S. v. Moreland, 258 U. S. 433.
Lipke v. Lederer, 259 U. S. 557.
Adkins v. Children's Hospital, 261 U. S. 525.
A. B. Small Co. v. American Sugar Ref. Co., 267 U. S. 233.
Blodget v. Holden, 275 U. S. 142.
Untermeyer v. Anderson, 276 U. S. 440.
Radford v. Louisville Joint Stock Land Bank, 295 U. S. 555.

a date long prior to March 1, 1937, and bearing interest in the future at rates materially higher than the rates borne by the bonds of the class first mentioned. The City of Sanford proposed that by a vote of the holders of the bonds having the lesser amount of rights, the surplus rights above mentioned should be taken away from the second class of bondholders without the consent and over the protest of the holders of the bonds of the class being penalized. If Section 83(j) is construed to permit this treatment, it is, we submit not permissible legislation, but is void as in contravention of the Fifth Amendment.

295 U. S. 589, *Louisville Bank v. Radford:*

> "The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment."

186 U. S. 181, *Hanover Bank v. Moyses:*

> "Congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law."

R. R. Retirement Board v. Alton R. R., 295 U. S. 330, dealing with the Retirement Act provision in favor of previously discharged railroad employees, the Court said:

> "This clearly arbitrary imposition of liability to pay again for services long since rendered and fully compensated is not permissible legislation. The Court below held the provision deprived the railroads of their property without due process and we agree with that conclusion. Here again the petitioners insist that the requirement is appropriate because they say it does not demand addi-

tional pay for past services, but expenditure 'for a present and future benefit through improvement of the personnel of the carriers'. But the argument ends with mere statement. Moreover, if it were correct in its assumption, which we shall presently show it is not, nevertheless, there can be no constitutional justification for arbitrarily imposing millions of dollars of additional liabilities upon the carriers in respect of transactions long closed on the basis of cost with reference to which their rates were made and their fiscal affairs adjusted."

Caldwell v. Texas, 137 U. S. 692:

"and due process is so secured by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."

Nebbia v. New York, 78 L. Ed. 940, 291 U. S. 502.

"The fifth amendment in the field of federal activity and the fourteenth, as respect state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process, and the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained. It results that a regulation valid for one sort of business, or in given circumstances may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

In re: City of West Palm Beach, 96 Fed. (2d) 85:

"The binding of a minority by a majority having the same interests was discussed as respects corporate reorganizations in *Texas Hotel Securities Co. v. Waco Development Co.*, (5th Cir.) 87 F. (2d) 395; and *Continental Ins. Co. v. Louisiana Del. Ref. Corp.*, (5th Cir.), 89 Fed. (2d) 333. The importance of identity of interest is there stressed. We do not think the creditors of West Palm Beach who have already irrevocably scaled their debts can be considered either in the two-thirds finally to be needed, nor as preliminary acceptors of the scaling plan offered as a composition."

Continental Ill. Bank & Trust Co. v. C. R. I. & P. Co., 294 U. S. 648:

"As far back as *Colder v. Ball*, 3 Dell. 386, 1 L. Ed. 648, it was said that among other acts which Congress could not pass was 'a law that destroys or impairs the lawful private contracts of citizens' * * * Speaking generally, it may be said that Congress, while without power to impair the obligation of contracts by laws acting directly and independently to that end, undeniably has authority to pass legislation pertinent to any of the powers conferred by the Constitution, however it may operate, collaterally or incidentally to impair or destroy the obligation of private contracts."

Untermeyer, Executrix v. Anderson, 276 U. S. 440:

In this case the Court held that the Gift Tax Act adopted by Congress June 2, 1924 was applicable to gifts throughout the year 1924 and that (head note 2): "So far as applicable to bona fide gifts not made in anticipation of death and fully consummated prior to June 2, 1924 these provisions are arbitrary and invalid under the due process clause of the Fifth Amendment."

See also: 275 U. S. 142, *Blodgett v. Holden.*
Columbia Bank v. Okely, 4 Wheat. 244:

> "As to words from Magna Charta incorporated in the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they are intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

See also:

75 Fed. 2d 256, *Re. Central Funding Corporation,* (C. C. A. 2).
75 Fed. 2d 947, *Campbell v. Allegheny Corp.,* (C. C. A. 4).

10 Fed. Sup. 776, *Re Pierce Arrow Sales Corp.*

The obligations sought to be impaired are obligations of a subdivision of the State. The Court, we are sure, has in mind that the obligations sought to be shrunk without the consent of their holders are the obligations of a municipal corporation and has in mind that in the *Ashton* case, 298 U. S. at 531 it said:

> "If obligations of States or their political subdivisions may be subjected to the interference here attempted, they are no longer free to manage their own affairs; the will of Congress prevails over them; although inhibited, the right to tax might be less sinister. And really the sovereignty of the State, so often declared necessary to the federal system, does not exist. McCulloch v. Maryland, 4 Wheat. 316, 430. Farmers & Mechanics Bank v. Minnesota, 232 U. S. 516, 526.
>
> "The Constitution was careful to provide that 'No State shall pass any Law impairing the Obligation of Contracts.' This she may not do under

> the form of a bankruptcy act or otherwise. Sturges v. Crowninshield, 4 Wheat. 122, 191. Nor do we think she can accomplish this same end by granting any permission necessary to enable Congress so to do."

and that it in that decision proceeded to hold unconstitutional the original Municipal Bankruptcy Act.

The Court will moreover undoubtedly have in mind the fact that it thereafter affirmed the constitutionality of the Second Municipal Bankruptcy Act in the *Bekins* case, 304 U. S. 27, and that in the course of its opinion, the following occurred. On page 49, the Court said:

> "**Third.** We are thus brought to the inquiry whether the exercise of the federal bankruptcy power in dealing with **a composition of the debts of the irrigation district,** upon its voluntary application and with the State's consent, must be deemed to be an unconstitutional interference with the essential independence of the State as preserved by the Constitution."

The Court then referred to the *Ashton* case and thereafter quoted at length from the report of the Congressional Committee, which strongly stressed the fact that the new statute was bottomed on a composition, which in turn was bottomed on the consents of 51% of the creditors affected by the plan. Thereafter on page 51, the Court said:

> "We are of the opinion that the Committee's points are well taken and that Chapter X is a valid enactment. The statute is carefully drawn so as not to impinge upon the sovereignty of the State. The State retains control of its fiscal affairs. The bankruptcy power is exercised in relation to a matter normally within its province and **only in a case** where the action of the taxing agency in **carrying**

> **out a plan of composition** approved by the bankruptcy court is authorized by state law. It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power."

Thereafter on page 54 the Court said:

> "Fourth. As the bankruptcy power may be exerted to give effect to a plan **for the composition of the debts of** an insolvent debtor, we find no merit in appellant's objections under the Fifth Amendment. In re Reiman, *supra;* Continental National Bank v. Chicago, R. I. & P. Ry. Co., *supra.*"
>
> (All emphasis in above quotations by present writers).

All of this emphasizes the fact that in order for the statute to be constitutional, the consent of the majority of the creditors affected by the plan must be secured. In the case at bar, not one single creditor affected by the plan has given his consent. The consents by which the affected creditors are sought to be coerced are consents of creditors whose interests are not affected by the plan.

So, too, if the statute baldly permitted bondholders participating in a discussion of the solvency or insolvency of a City held on January 28, 1939, to be counted for the purpose of determining such solvency or insolvency, not at the amounts which were due them by the City on January 28, 1939, but at the amounts which were due them by the City on February 1, 1937, although the amounts due February 1, 1937, were materially larger than the amounts due January 28, 1939, this Court would undoubtedly brand that statute unconstitutional. That, however, is in substance what is being sought to be done here, since the action gives those "refunding

bondholders" rights to which they are not entitled and takes away from the "old bondholders" rights to which they are entitled. Those "old bondholders" are here before the Court contending that the statute as thus construed deprives them of due process, in violation of the provisions of the Constitution of the United States.

All of which is respectfully submitted.

AMERICAN NATIONAL BANK
OF NASHVILLE, TENNESSEE,
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August, 1940.

APPENDIX

I.

As excerpts from the hearings before the Judiciary Committee upon the subject of Municipal Bankruptcy are printed in the margin of the decision of the Circuit Court of Appeals, it is believed that the Court will be interested in the following extracts from the hearings before the Special Subcommittee of Congress on Bankruptcy and Reorganization held February 14, 15 and 16, 1940:

On February 14, 1940 the Subcommittee of the House Committee on the Judiciary convened for public hearing on H. R. 8016 which bill as redrafted was submitted by Mr. Cannon. In his redrafted bill Mr. Cannon proposed that subsection (j) of Section 83 of such act, as amended and supplemented, be amended to read as follows: (pages 2 and 3)

> "(j) * * * The confirmation of any such plan of composition shall not be denied on the ground that the plan submitted for confirmation is at variance with the original plan, which is partially completed or executed, if the terms of the plan submitted for confirmation are not less favorable to the creditors than the terms of such original plan, nor on the ground that partial completion of such original plan has made it possible for the petitioner to meet its debts as they mature: Provided, That such inability to meet its debts existed prior to the time such original plan was partially completed."

At later hearings on February 14, 15 and 16 the bill H. R. 8016 was amended, reintroduced and finally passed as H. R. 9139. This amended bill does not incorporate the proposed amendment of Section 83 of the Act and does not mention or amend subsection (j).

The bill was approved June 28, 1940, U. S. Code Cong. Service Advance Sheets 6, p. 656 and is printed

infra. The proposed amendment by Mr. Cannon in H. R. 8016 was not the first effort to make subsection (j) retroactive, as apparently it was then recognized it was not retroactive.

The Judiciary Committee of the Senate reported on H. R. 6505 "To make proceedings taken under the Act speak as of the date of the original plan of settlement" on July 20th, 1939, and in this connection the report of the House Committee on pages 234 and 235 contains the following:

"MEMORANDUM RE: H. R. 6505 AND OTHER MEASURES THAT MAY BE INTRODUCED TO AMEND MUNICIPAL BANKRUPTCY PROVISIONS OF BANKRUPTCY ACT

"H. R. 6505 proposes four amendments; Senate committee recommends an additional amendment numbered 5 below:

* * * * *

"(5) To make proceedings taken under the Act speak as of the date of the original plan of settlement.

* * * * *

"This proposal is to clarify present ambiguities by fixing the date as of which proceedings under the act shall speak. The debtor city establishes its insolvency at the inception of negotiations, say in 1936; and that in 1936 it arranged a settlement with two-thirds of its creditors, as a result of which it is perhaps no longer insolvent. The city in 1940 seeks to enforce this partially completed settlement against the minority. But the city is no longer insolvent, though it would become so again if the minority were permitted to pursue their strict legal remedies. The proposed amendment would remove this ambiguity in the statute without changing its evident intention."

II.

See also the amendments to Sections 81, 83(b) and 84 of the Municipal Bankruptcy Act approved June 28, 1940, H. R. 9139, Chapter 438, 3d Session, Public No. 669, 76 Congress, U. S. Code Congressional Service, Advance Sheets No. 6, page 656.

III.

Chapter 15,772 Laws of Florida, 1931, Vol. 1, p. 1368, being the Florida Refunding Act, contains the following Sections:

> "Section 2. Each County, City, Town, Special road and bridge district, special tax school district, and other taxing districts in this State, herein sometimes called a unit, is hereby authorized to issue, pursuant to a resolution or resolutions of the governing body thereof (meaning thereby the board or body vested with the power of determining the amount of tax levies required for taking the taxable property of such unit for the purpose of such unit) and either with or without the approval of such bonds at an election, except as may be required by the Constitution of the State, bonds of such unit for the purpose of refunding any or all bonds, coupons, or interest on any such bonds, or coupons or paving certificates of indebtedness or interest on any such paving certificates of indebtedness, now or hereafter outstanding, or any other funded debt, all of which are herein referred to as bonds, whether such unit created such indebtedness or has assumed, or may become liable therefor, and whether indebtedness to be refunded has matured or to thereafter become matured."

* * * * *

> "Section 8. Bonds issued under this Act may be exchanged for not less than an equal principal amount and/or accrued interest of indebtedness to be retired thereby, including indebtedness not yet

due, if the same be then redeemable or if the holders thereof be willing to surrender the same for retirement, but otherwise shall be sold and the proceeds thereof shall be applied to the payment of such indebtedness and/or accrued interest due or redeemable which may be so surrendered."

* * * * *

"Section 11. In case of refunding bonds which are not exchanged for bonds outstanding but are sold, only such amount thereof shall be delivered as is necessary to provide for the payment of matured bonds and legally accrued interest and of such unmatured bonds as the holders thereof have agreed in writing to surrender upon payment of a sum not exceeding par and legally accrued interest."

* * * * *

"Section 14. As hereinbefore provided the refunding bonds instead of being sold may be exchanged for bonds or for interest on bonds or interest on overdue interest on bonds to refund which they are issued. The principal and accrued interest of the refunding bonds shall not exceed the amount of the obligations refunded."

* * * * *

"Section 16. The resolution authorizing the refunding bonds may contain an agreement on the part of the unit to provide a sinking fund for such bonds, and said resolution may provide for payments of such sinking fund, the investment thereof, the administration thereof, and the application thereof to the payment, purchase and redemption of the refunding bonds."

* * * * *

"Section 17. The resolution authorizing refunding bonds may assign, pledge, or set aside as a trust for the payment of principal or interest of refunding bonds or for a sinking fund for the

bonds, subject to prior liens or contract obligations, and on, or subject to, such terms and conditions as may be stated, any unpaid taxes or assessments whether due or to grow due, and any revenues due or to grow due, or proceeds of sale of improvements or properties of the unit. The resolution authorizing the bonds may contain agreement to collect and pay over the moneys derived from such source."

* * * * *

"Section 18. The resolution authorizing the refunding bonds may pledge to the payment of principal and interest of such refunding bonds or to a sinking fund for the bonds, a fixed proportion, or a proportion to be determined from time to time as provided, in said resolution, of the moneys from time to time collected either by taxation of any kind, whether upon real or personal property, or collected from other revenues or receipts of the unit, and such resolution may provide that the said fixed proportion or the proportions so determined out of each dollar collected by the unit shall be applied to the payment of the principal or interest of the refunding bonds, or be paid into or set aside as a sinking fund for the bonds."

* * * * *

"Section 19. The resolution authorizing the bonds may provide that the unit shall first set aside out of the tax collections the amount required in any year for the payment of principal and interest of refunding bonds and for the sinking fund for the bonds, before any tax collections shall be set aside or applied to the payment of any bonds of the unit may thereafter be issued except bonds thereafter issued to pay or refund bonds then outstanding."

No. 323

In the
Supreme Court of the United States

OCTOBER TERM, 1940

AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE,
Petitioner,

versus

CITY OF SANFORD, FLORIDA, AND THE UNITED STATES OF AMERICA,
(Intervenor).

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION

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CITATIONS

In the
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OCTOBER TERM, 1940

No. 323

AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE,
Petitioner,
versus
CITY OF SANFORD, FLORIDA, et al.,
Respondents.

REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION

Preliminary Statement

A.

Inasmuch as the counsel for the Government has misconceived the points relied upon by the appellant in this appeal and has premised its argument on questions not in issue and not relied upon in these proceedings, in all fairness to it and to the petitioner this reply to its brief is submitted.

The Facts

B.

The statement of facts set forth by the Government is substantially correct except that it is not conceded, as alleged on page 3 of the Government's brief,

that the city on February 1, 1937, adopted a *plan for the composition* and adjustment of its indebtedness by the issuance of refunding bonds in exchange for outstanding bonds of the city. As a matter of fact, no *plan of composition* could have been adopted then because the Bankruptcy Act was not in existence at that time. The plan referred to was nothing more than voluntary offer made by the city to any of its creditors who chose to accept the same.

Argument

I.

The Government grounds its contention upon the theory that debts theretofore irrevocably cancelled might be revived for the purpose of creating an identity of interest in the coercing bondholders so that the coercing bondholders might be affected by the plan to the same extent that the non-consenting bondholders were affected, and that being true, that the amendment, **83** (j), is not in conflict with other portions of the act and the Constitution of the United States. It reasons:

1. That those coercing bondholders whose debts must of necessity be revived, if they are to be included as consenting creditors, were at one time (prior to the passage of the act), though not now, in the same position as the petitioner, and it reasons further that the voluntary acceptance of the refunding bonds by them is a warranty of the fairness of the plan now before the court.

2. (a) It reasons further that it is constitutional because there was no vested right in the petitioner to insist upon the continuation of the bond settlement, and

(b) That the petitioner has not shown that the State of Florida might not authorize the rescision of the bond settlement agreement.

3. That had the Bankruptcy Act been in existence at the time the voluntary exchanges were made, there would have been no question but that the majority could have validly bound petitioner under composition agreement.

Thus, they reason that 83 (j) might retroactively validate consents theretofore existing by reason of the acceptance of refunding bonds and revive debts no longer in existence solely for the purpose of showing an identity of interest.*

II.

The argument of the Government under the first numbered paragraph of its brief has overlooked the actual state of facts in this case when it says

> "that at the time the present holders of the refunding bonds consented to the plan and exchanged the old securities for the new, they were in precisely the same position as the petitioner."

It does not appear that the present consentors to the refunding plan are the same holders who exchanged the bonds under the voluntary agreement. The record shows that the consenting creditors accepted their se-

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* The Government does not concede that the Congress can not constitutionally legislate on the subject of bankruptcy without making provision for the majority consent in this class of cases, see *U. S. vs. Bekins*, 304 U. S. 27, 47, and the petitioner does not dispute the fact that Congress might constitutionally legislate without making provisions for majority consents, but if it does, the holders of all indebtedness existing either at the time of the passage of such legislation or at the time of the adjudication in bankruptcy must be treated alike, and for this purpose may not revive indebtedness prohibited by state law.

curities long prior to the enactment of the Bankruptcy Act and the amendment Subsection 83 (j), and therefore could not have accepted them in contemplation of any bankruptcy proceedings. Thus, the holders of refunding bonds are definitely not in the same position as the petitioner herein.

The petitioner's position is that it is arbitrary legislation to permit the holders of voluntarily scaled down indebtedness, who are not to be affected by the adjudication, to coerce and force the holders of indebtedness which has not been scaled down to accept a plan of composition based not upon the ability of the city to pay as of the date of the adjudication, but based upon the ability of the city to pay at some arbitrarily fixed date in the past (see pages 9 to 15 of Petition for Writ of Certiorari).

Further, it is impossible under the statutes and laws of the State of Florida for these holders of refunding bonds to be placed back again in the same position as the petitioner (see foot note page 6 of Petition for Writ of Certiorari).

We point out, also, that at the time of the exchange of bonds, the matter was not presented to the court:

(a) for any adjudication as to its fairness,

(b) as to whether or not all of the provisions of the Bankruptcy Act had been complied with,

(c) whether or not the fees taken by the bondholders' committee were fair and equitable,

(d) whether or not there was any preference accorded to any of the acceptors of refunding bonds,

(e) or any of the other requirements that the debtor must comply with before the matter is finally confirmed by an adjudication of bankruptcy.

There was no finding that the plan was fair and equitable, and the fact that refunding bonds had been accepted was no warranty of the fairness of the plan as applied to all bondholders, contrary to the Government's contention in the first numbered portion of its brief.*

III.

In the second numbered portion of its brief, the Government has misconceived the position of the petitioner. Petitioner does not claim that it was a party to nor an intended beneficiary of the bond settlement. It insists that it is not a party to the voluntary adjustment and that its rights are not dependent upon being a party to such adjustment, but are rights, which, incident to the ownership of the bonds not included in a voluntary adjustment, are protected under the Fifth Amendment.

(a) Petitioner does not question the fact that, had the settlement been made conditional upon the acceptance of the plan by all the creditors, the coercing cred-

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* Precisely the same question was raised recently in the case of *Case v. Los Angeles Lumber Co.*, 84 Lawyers Ed. 22, where it was submitted under 77B that where the required percentage of creditors had accepted a plan, that was evidence that it was fair and equitable. This court definitely rejected such a contention, saying:

> "It is clear from a reading of 77B(f) that Congress has required both that the required percentages of each class of security holders approve the plan and that the plan be found to be 'fair and equitable.' The former is not a substitute for the latter. The court is not merely a ministerial register of the vote of the several classes of security holders. All of those interested in the estate are entitled to the court's protection. Accordingly, the fact that the vast majority of the security holders have approved the plan, is not the test of whether the plan is a fair and equitable one."

itors would have an identity of interest with the non-assenting creditors. However, such was not the case, and the holders of refunding bonds have irrevocably scaled their debt and there is no way in which their former claim can be revived for any purpose whatsoever.

The city is not only not authorized by the State of Florida to rescind the bond settlement, but the statutes of the State of Florida expressly forbid any increase in indebtedness in the manner suggested by the government. (See footnote Page 6 and Page 12 of Petition for Writ.) Indeed, Section 83 (e) of the act itself provides that it must appear that the taxing unit "is authorized by law to take all action necessary to be taken by it to carry out the plan." (11 U.S.C.A. Sec. 403 (e) (6).) This phrase "authorized by law" was said by this court in *U. S. vs. Bekins,* 304 U. S. 27. 49, 52 to "manifestly refer to the law of the state" and the Act itself was said to have been "carefully drawn so as not to impinge upon the sovereignty of the state. The State retains control of its fiscal affairs."

The construction given by the government to the amendment Sec. 83 (j), if upheld by this Court, would impinge violently upon the sovereignty of the State; a result which was carefully avoided by the authors of the act itself.

Counsel for the Government have overlooked the fact that we are not here dealing with a binding executory settlement agreement which might be rescinded by agreement of the parties, but are dealing with an absolute cancellation of indebtedness and issuance of entirely new evidences of indebtedness.

Petitioner makes no claimed advantage under the Fifth Amendment by virtue of the voluntary bond settlement, but it does claim, in view of the prohibition of that amendment, that to permit those whose debts are not to be affected by an adjudication to bring other creditors into court and force them to scale down their indebtedness is a denial of due process of law.

The cases cited by the Government to justify its position, viz., *Edward Hines Trustees vs. U. S.*, 263 U. S. 143; *Sprunt & Sons. vs. U. S.*, 281 U. S. 249, are not in any sense applicable to the situation. In those cases, the court ruled that a shipper who had previously enjoyed a competitive advantage by reason of carrier's freight rates could not be heard to complain of a change in rates by the carrier under an order of the Interstate Commerce Commission, which change did away with undue prejudice and preference as between shippers. There the complainers were not threatened with any legal wrong. In the instant case petitioner has an independent legal right, viz., a right not to be coerced into accepting a plan of composition except by the consents of those creditors similarly situated (i.e. to be affected by the adjudication) and the right to have the ability of the city to pay determined on the basis of its outstanding debt as of the date of the filing of the petition and not as of a date fixed at some arbitrary prior time.

(b) The Government, in part 2 of Subsection (b) of its brief, again demonstrates the fundamental errors of its position. It has overlooked the fact that the first Municipal Bankruptcy Act was stricken down by this court (*Ashton vs. Cameron County Dist.*, 298 U. S. 513) because invading the province of state's rights,

and also has overlooked that this court, in *U. S. vs. Bekins,* 304 U. S. 27, 47, upheld the second Municipal Bankruptcy Act as not being violative of state's rights because the taxing unit was authorized by the law of the State to take advantage of the act of Congress. The Government, in this portion of its brief, does not attempt to show that the bond settlement can be rescinded by the law of the State of Florida, and it admits that the settlement was not rescinded by the parties and that the State of Florida has not authorized the rescinding of the bond settlement agreement, which authorization under the ruling of this court would be necessary for the City of Sanford to take advantage of the Amendment 83 (j) of the Municipal Bankruptcy Act.

The Government's reference that the Fifth Amendment does not prohibit the state from authorizing the majority of bondholders to rescind the agreement is again begging the question. The Fifth Amendment has never been considered or held a prohibition upon the State but upon the Federal Government. Not only has the State of Florida never authorized the rescision of the agreement and the revival of debt, but it is prohibited from authorizing such revival of debt under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. Certainly it is not due process of law if a statute, either State or Federal, baldly permitted some 4,000 holders of bonds of the principal sum of $1,000.00 each, by their votes to compel 240 non-assenting bondholders of bonds in the face value of $1,500.00 each, to accept a plan of composition which gave each of the 4,240 bondholders identical bonds of $1,000.00 each. This court would undoubtedly brand that statute as unconstitutional. Stripped of

those camouflaging details, that is exactly what the plan before the court contemplates doing. Petitioner's position is that this may not be done, either

(1) because 83 (j) does not authorize it, or

(2) because, if 83 (j) does authorize it, 83 (j) is unconstitutional.

IV.

In part 3 of its brief, the Government has posed a situation, not borne out by the record. This petitioner is not claiming any vested rights arising by reason of the bond settlement. It claims rights — contractual rights — given it under its bonds which, as has been shown, the State cannot change, nor can the Federal Government change in the manner proposed in the brief of the Government.

There were no consents given by the majority at the time the refunding agreements were executed. The alleged refunding agreement was only an exchange of bonds and a cancellation of indebtedness. The alleged *plan of composition* (**R 2** to **4** and **23** to **47**) was simply a resolution of the city authorizing refunding bonds, and a surrender and cancellation of old bonds in exchange therefor.

There were no consents given, so they could not be made retroactively. Section 83 (j) can not change a cancellation of debt and acceptance of new evidences of indebtedness into a contingent consent and revive a debt irrevocably cancelled.

Conclusion

In conclusion, petitioner respectfully submits that the Government has not shown any reason why this

court should not grant the petition and take jurisdiction, but on the contrary, has argued the merits of the controversy and the petitioner has accepted the challenge of the Government and answered it briefly on the merits in this, its Reply Brief.

The petitioner respectfully submits that it has heretofore shown in its Petition for Writ (Pages 15 to 20) the necessity for the issuance of a Writ of Certiorari.

Respectfully submitted,

American National Bank of
Nashville, Tennessee,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1940

No. 323

AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE, PETITIONER

VERSUS

CITY OF SANFORD, FLORIDA, ET. AL.
RESPONDENTS

BRIEF ON BEHALF OF RESPONDENT CITY OF SANFORD, FLORIDA, ON PETITION OF AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

FRED R. WILSON
ROBERT J. PLEUS
ATTORNEYS FOR RESPONDENT
CITY OF SANFORD, FLORIDA

SUPREME COURT
OF THE UNITED STATES

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OCTOBER TERM 1940

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No.__________

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AMERICAN NATIONAL BANK OF
NASHVILLE, TENNESSEE, PETITIONER

VERSUS

CITY OF SANFORD, FLORIDA, ET. AL.
RESPONDENTS

•

BRIEF ON BEHALF OF RESPONDENT CITY OF SANFORD, FLORIDA, ON PETITION OF AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

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PRELIMINARY STATEMENT

On pages 15 to 21 of the petition for writ of certiorari in this case the petitioner assigns its purported reasons why a writ of certiorari should issue. It has argued these reasons in its petition and has also filed a separate brief in support thereof. It asserts that the questions involved are important ones of federal law arising under the Bankruptcy Act, which have not been settled by this Court, but respondent contends that the questions have been settled by the Court of Appeals of the Fifth Circuit in a logical, clear and forceful opinion, 112 Fed. Rep. (2nd) 435, and that Section 83 (j) (11 U. S. C. A. 403 (j) of the Bankruptcy Act which is the Statute in question is so obviously a constitutional exercise of the powers of Congress under its authority to establish a uniform system of bankruptcy, that no conflict among the Courts will arise and that if the question is raised in other Courts the decision in the present case by the Circuit Court of Appeals of the Fifth Circuit would constitute a precedent which would be promptly and unqualifiedly followed by such other Courts. The decision is in line with the progressive constructions which have been adopted by the Courts throughout the history of bankruptcy legislation.

So far as the respondent has been able to ascertain there have been no other decisions by any of the Courts on the constitutionality or applicability of Section 83 (j) of the Bankruptcy Act and the respondent contends that there is no conflict of any kind between the decision in the present case and any of the prior decisions of this Court or other Federal

Courts or the Supreme Court of the State of Florida or statutes of the State of Florida.

Reasons (b), (c), (d) and (e) assigned for issuance of the writ are also argued by petitioner under the assignments of error set forth in its brief.

The respondent, City of Sanford, Florida, replies as follows to the petition and brief:

SUMMARY OF BRIEF

The only questions involved in this case are:

1. Whether or not Sub-section (j) of Section 83 of the Bankruptcy Act, as amended, 11 U. S. C. A. Sec. 403 (j) providing that the written consent of the holders of securities outstanding as the result of the partial completion or execution of a plan of composition shall be included as consenting creditors to such plan of composition in determining the percentage of the securities affected by such plan of composition is a constitutional exercise of the powers of Congress under its authority to establish a uniform system of Bankruptcy throughout the United States, and

2. Whether or not it is applicable to taxing units which have partially completed a plan of composition before the enactment of Sub-section (j) of the said Section 83 of the Bankruptcy Act, as amended on June 22, 1938.

The Respondent, City of Sanford, Florida, contends:

a. That said Sub-section (j) of Section 83 of the Bankruptcy Act, as amended, is a constitutional

exercise of the power of Congress in the matter of Bankruptcy legislation. and

b. That said Sub-section (j) is retroactive and applicable to any taxing unit which has partia'' completed or executed a plan of composition prior to its enactment.

In this reply brief we will follow the manner of presentation of the case adopted by the petitioner.

I.

RELIEF SOUGHT

The petitioner, American National Bank of Nashville, Tennessee, has correctly stated the relief sought in this proceeding, which is to review a judgment of the Circuit Court of Appeals, Fifth Circuit, affirming an order of the United States District Court for the Southern District of Florida, upholding the constitutionality of Sub-section (j) of Section 83 of the Bankruptcy Act, which Sub-section was passed as an amendment to the Chandler Act of June 22, 1938.

The opinion of the lower court sought to be reviewed herein will be found in 112 Federal Reporter, 2d Series p. 435.

II.

BASIS OF JURISDICTION OF THIS COURT.

The Respondent, City of Sanford, Florida, agrees that this Court has jurisdiction of the matter under the sections of the Judicial Code, Bankruptcy Act, Rule and Decisions of this Court, cited by Petitioner.

III.

CONCISE STATEMENT OF THE CASE.

The record discloses (R. 1) that on the first day of July, 1929, the respondent, City of Sanford, Florida, had an outstanding bonded indebtedness of $7,003,000.00; that this amount had been reduced to $5,900,000.00 as and of the first day of February, 1937 (R. 2); that on the first day of February, 1937, the respondent adopted Resolution No. 499 (R. 23) providing for a composition of its last mentioned indebtedness by the issuance of Refunding Bonds in the total amount of $5,900,000.00, said Refunding Bonds to be designated as Refunding Bonds, Series A in the principal amount of $5,274,000.00 (R. 28) and Refunding Bonds, Series B, in the principal amount of $626,000.00 (R. 28) Refunding Bonds, Series A, to be exchanged for all the outstanding bonds of respondent except certain "Public Utility Bonds" and "Improvement Bonds Series CC", which were water works bonds of respondent. All of the Refunding Bonds were to be dated March 1, 1937, and to mature September 1, 1977 (R. 27); Refunding Bonds, Series A, to bear interest at rates from 1% to 2½% per annum and Refunding Bonds, Series B, to bear interest at rates from 2% to 3% per annum (R. 29).

At the time of the filing of the petition respondent had bonds outstanding which had not been exchanged for Refunding Bonds, Series A, in the amount of $231,000.00 (R. 7) and bonds outstanding which had not been exchanged for Refunding Bonds, Series B, in the amount of $15,000.00 (R. 7).

The Petitioner has correctly stated that after the first Municipal Bankruptcy Act had been declared

unconstitutional and before the adoption of the present Municipal Bankruptcy Act or Section 83 (j) thereof, the Respondent, City of Sanford, Florida, offered to any of its bondholders willing to accept the same, certain Refunding Bonds in exchange for a like principal amount of "old bonds" but this Respondent does not agree that said offer was not a plan of composition within the meaning of the Bankruptcy Act nor that the restoration of the bondholders to the status quo ante was prohibited for the reasons stated by Petitioner; nor that the Circuit Court of Appeals fell into error in the manner stated by Petitioner; nor that at the date of the adoption by Congress of the second Municipal Bankruptcy Act the municipal indebtedness of the City of Sanford really consisted of two series of bonds, "old bonds" and "refunding bonds", nor that the rights of the two series were materially different.

The plan of composition as stated by Petitioner did not propose to change in any manner the rights of the holders of "refunding bonds" but did provide for an exchange of refunding bonds for a like principal amount of the "old bonds".

The City of Sanford attached to its petition the written consents of the holders of "refunding bonds", amounting to more than 51% of its indebtedness, and which were "securities outstanding as the result of partial completion or execution" of its plan of composition, and relies upon such written consents to confer jurisdiction upon the Court.

The Petitioner, American National Bank of Nashville, Tennessee, and two other non-assenting bondholders, namely, C. J. Root and Fiduciary Counsel, Inc. filed answers and Motions to Dismiss

the petition upon the ground that Sub-section (j) of Section 83 of the Bankruptcy Act was not applicable and, if applicable, was unconstitutional, (R-93-128) C. J. Root and Fiduciary Counsel, Inc. have accepted refunding bonds and been dismissed from the proceedings.

The United States intervened and the Attorney General's office filed a brief and made an oral argument in the matter.

IV.

ARGUMENT

The Petitioner has assigned eight alleged errors. We believe that it will expedite a consideration of this brief to repeat the assignments of error.

ASSIGNMENT NO. (1).

> The Court of Appeals erred in holding that "nothing in the acceptance (of the plan of voluntary adjustment) prevents the City and the acceptors from undoing the whole plan", since (a) the statutes of Florida, (b) the decisions of the Supreme Court of Florida, (c) the City charter of Sanford, and (d) the express provisions of the "plan of voluntary adjustment", all prohibit restoration of the status quo ante.

It seems to respondent that the question raised by this assignment is premature as it should be determined when the necessity or propriety for the restoration of the status quo ante arises, but we find nothing in the statutes of Florida, the decisions of the Supreme Court of Florida, the City Charter of Respondent or the express provisions of the plan of composition prohibiting a restoration of the status

quo ante should it be necessary to do so. However. the Municipal Bankruptcy Act provides that the plan of composition may be modified and we feel that that is what the Circuit Court of Appeals had in mind when it referred to "undoing the whole plan." If necessary, the plan could be modified without a restoration of the status quo ante.

The Florida statute under which the refunding bonds were issued, namely, Chapter 15,772 of the Laws of Florida, 1931, Sections 8 and 14, only forbids the issuance of refunding bonds for a greater amount of principal and accrued interest for the debts to be refunded and a restoration of the status quo ante, if it should become necessary, would not violate the Refunding Act, and a modification of the plan, if necessary, would not necessarily result in issuing bonds in an amount in excess of the obligations refunded. The Supreme Court of the State of Florida in the case of City of Miami v. State 190 Sou. 774 (brief, page 9) only outlined the mechanical and clerical procedure for the handling of refunding bonds, which would of course call for a surrender and cancellation of old bonds, and the decision in that case is in no way in conflict with the bankruptcy act in question.

The Petitioner quotes Section 123 (Brief, page 10) of Chapter 9897, Laws of Florida, 1923, authorizing the City Commission to issue bonds in the first instance but this section in no way conflicts with the Refunding Act of the State of Florida, nor would it prevent a restoration of the old indebtedness if that became necessary and proper.

Said Section 123 was amended by Chapter 11718, Laws of Florida, 1925, so as to remove the debt limit.

On page 13 of the Petitioner's brief appears a misstatement, through oversight, of the record. The city at the time of the filing of its petition had bonds exchangeable for refunding bonds, Series A, in the sum of $231,000.00 and bonds exchangeable for refunding bonds, Series B, in the sum of $15,000.00 and not bonds exchangeable for refunding bonds, Series B, in the sum of $231,000.00.

ASSIGNMENT NO. (2)

> The Court of Appeals erred in holding that 83 (j) of the Municipal Bankruptcy Act is applicable not only to a partially completed plan of composition, but also to a partially executed plan of voluntary adjustment, although said "plan of voluntary adjustment" was (a) executed irrevocably by a large majority of the bondholders at a time when there was no Municipal Bankruptcy Act in existence; (b) contemplated no coercion of non-assenting bondholders; (c) contemplated no submission to or approval by any Court; and (d) did not contemplate collective action, but was offered to and accepted by individual bondholders, each being permitted to act and acting finally and irrevocably for himself, regardless of the action of the other bondholders.

In the above assignment of errors Petitoner stresses what it terms to be a difference between a voluntary adjustment and a plan of composition as those words are used in Sub-section (j). It also cites the case of In Re: City of West Palm Beach, 96 Fed. (2nd.) 85, in which the Court referred to the distinction between a plan of composition and a proposed adjustment out of Court, but the Court also

said in that case that such proposed adjustment out of Court might become a plan of composition by being presented to the Court, and Sub-section (j) authorizes the presentation to the Court of a plan of composition, which has been partially completed or executed, but which the Court in the West Palm Beach case held could not be done, which case was decided before the passage of Sub-section (j). Sub-section (j) was enacted for the express purpose of overcoming the effect of the decision in the West Palm Beach case. A brief history of the enactment of the statute is shown by the Journal of Congress and is as follows:

June 10, 1938

"Mr. Chandler, from the Committee on the Judiciary, submitted the following report to accompany H. R. 10753. The Committee on the Judiciary, to whom was referred the Bill (H. R. 10753) to amend 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and acts amendatory thereof and supplemental thereto, after consideration, report the same favorably to the House with recommendation that the Bill do pass.

"The Bill would amend the Municipal Bankruptcy Act, (Ch. 10 of the Act of 1898 as amended, Public Law 302,75 Cong.) to permit compositions by cities, etc., in accordance with the purposes of the original Act (Ch. 10).

"The necessity for the amendment arises by virtue of the decision of the Circuit Court of Appeals, Fifth Circuit, on April 14, 1938, in the West Palm Beach, Florida, case where it

was held that the Act permits only plans of composition which are wholly executory, and that evidence of indebtedness already exchanged under the plan prior to the filing of the petition could not be included in computing the necessary percentages of securities held by consenting creditors to declare the plan operative.

"H. R. 10753 would permit the Court to include new refunding bonds already exchanged under the plan of composition when figuring the percentages of consenting creditors, regardless of whether such exchange was completed before or after the filing of the petition.

"In the West Palm Beach case about 85 percent of new bonds had been exchanged prior to filing the petition. The plan cannot be enforced under the Circuit Court of Appeals case unless 66-2/3 percent of the remaining 15 percent give their approval, thus effectively preventing the operation of the Act of 1937."

It was wholly competent for the Congress to overcome by the enactment of Sub-section (j) the technical distinction that may have once existed between a plan of composition and a voluntary adjustment. This Court itself has held that under the provisions for private composition the theory of the composition is purely of contract,—an offer and an acceptance, Meyers v. International Trust Co. 273 U. S 380; 71 L. Ed. 672; 47 Sup. Ct. 372.

In the case of In Re: Lane, 125 Fed. 772, the Court in speaking of a composition said: "It is a proceeding voluntary on both sides by which the debtor of his own motion offers to pay his creditors a certain percentage of their claims in exchange for

a release from his liabilities . . . . . . Composition is thus treated, even in the act, as in some respects outside of bankruptcy" and the Court also said in the case referred to that "Except for this coercion of the minority the intervention of the Court of Bankruptcy would hardly be necessary."

In the case of Campbell v. Allegheny Corporation 75 Fed. (2d) 947, a voluntary plan of refinancing was begun prior to the enactment of the original section 77 B of the Bankruptcy Act and a large number of creditors had accepted the same. After the passage of Section 77 B the same plan was submitted as a plan of re-organization. It was contended in that case that the plan was a voluntary one of adjustment but the Court overruled that contention and held that it was immaterial that the plan was begun and consents thereto obtained prior to the enactment of section 77 B.

The respondent submits that there never was in fact the distinction between a voluntary adjustment and the plan of composition as contended by petitioner, but if such were true Congress destroyed such distinction by the enactment of Sub-section (j) as it related to taxing units proceeding under the municipal bankruptcy act.

ASSIGNMENT NO. (3)

The Court of Appeals erred as a matter of law in failing to hold that holders of "old bonds" and holders of "refunding bonds" are in different classifications and hence consents of one class may not be used to coerce members of the other class.

It is the contention of Respondent, City of Sanford, Florida, that until the plan of composition is wholly consummated, the holders of refunding bonds still represent the indebtedness evidenced by the bonds for which the refunding bonds were exchanged and Sub-section (j) continues them in their original classification. Refunding bonds are in fact only a continuation of the original obligations. State Ex Rel Pinellas County against Sholtz 115 Fla. 561; 155 Sou. 736. State against Bay County 116 Fla. 656; 157 Sou. 1, The Respondent submits also that Sub-section (j) of Section 83 of the Bankruptcy Act was in fact an amendment of the preceeding sections as to any partially completed plan of composition and a bankruptcy proceeding by a taxing unit can be worked out under the amendment in harmony with the other sections. It was competent for Congress to do this as a matter of law and in the exercise of its bankruptcy powers.

Petitioner cites the case of State ex rel Garland v. City of West Palm Beach, 193 So. 297, in which the Court held that a holder of unrefunded bonds could not compel the payment of such bonds out of ad valorem taxes levied to pay refunding bonds, but the Court did not pass upon the relative positions of refunding bonds and unrefunded bonds under the bankruptcy statute or undertake to say that the holders of refunding bonds constitute such a different class of creditors that a plan of composition could not be completed after they had accepted refunding bonds.

All of the obligations of respondent involved in this proceeding were and are general obligations for which respondent's full faith and credit are pledged.

ASSIGNMENT NO. (4)

The Court of Appeals erred in ruling that the written acceptances of holders of "refunding bonds" who are in no wise affected by the "plan of composition" can be considered in computing 51% of acceptances required by the Municipal Bankruptcy Act, Section 83 (a); (11 U. S. C. A. Sec. 403).

The Petitioner stresses under this assignment the provisions of the Municipal Bankruptcy Act defining the term "security affected by the plan" and contends the refunding bonds are not securities affected by the plan. As hereinbefore pointed out, the respondent contends that this is a proceeding for the completion of its plan of composition and it was competent for Congress to say that securities outstanding as the result of the partial completion or execution of the plan of composition are securities affected thereby.

The Circuit Court of Appeals disposed of all of the contentions of the petitioner, emphatically declaring that they rejected "as wholly without merit" petitioner's first and second contentions that the amendment was not intended to, and does not in terms, authorize the filing and, if the conditions of the act are met, the approval of the voluntary plan, as a plan of composition in bankruptcy.

The petitioner contends and has contended all along that the decision of the Circuit Court of Appeals in the West Palm Beach case is still applicable. This contention was likewise disposed of by the lower court as follows:

"That the amendment was intended to reach and provide a remedy for the precise situation in which

the City of Sanford finds itself, we think there can be no doubt. From the report of the Committee of the Judiciary accompanying H. R. 10,752, it plainly appears it was passed to meet the situation dealt with in our opinion in Re City of West Palm Beach, Florida, 5 Cir., 96 F. 2d 85. We think it equally clear that the amendment, if valid, is effective to meet and provide a remedy for that situation."

The lower court also rejected the contention of the petitioner that sub-section (j) deprives petitioner of vested rights, pointing out in clear and forceful language that none of the petitioner's so-called vested rights were impaired.

The Court also said that there was no real difference between an agreement to accept refunding bonds and the actual acceptance thereof and that it was wholly competent for Congress to provide that persons already consenting could be counted in the compulsory plan, should a petition for composition be filed.

> "The power of congress to enact bankruptcy legislation is plenary subject only to the due process clause."
>
> In re Baltimore & Ohio R. Co.
>
> 29 Fed. Supp. 608 Hn. 5.

It was contended in the above case that the Railroad Adjustment Act was invalid as retroactive legislation in that it applied to a limited class of railroads having an acquired and particular status prior to the passage of the act, but this claim was held to be without merit.

It was likewise contended in the Baltimore & Ohio case above referred to that the non-assenting

creditors constituted a separate class but this claim was also rejected. The court said that, "The argument seems highly technical rather that substantial in relation to the large and important case here presented. But in addition, we consider the contention unsound." (Text 623).

In the case of In re Wichita Falls & Southern Ry. Co., 30 Fed. Supp. 750, it was held that the acceptance of a plan of adjustment by some bondholders and non-acceptance by a small minority did not create two classes of creditors. The court in that case said:

> "The contention seems to answer itself. It is a suggestion without weight and without even plausibility. . . . . .
>
> "If we put into the statute the contention of the objectors that the fact of objection creates a new class, we shall ingraft a new provision of percentages before a plan can fruit.
>
> "The Congress would hardly have worded the statute in the way we find it if it had been intended that those who object are, themselves, to become a class, and that a certain percentage of the objecting class shall be secured before a plan may be approved. That, upon its face, would defeat any arrangement and make ridiculous the highly important legislation."

The court in the case of In re Corcoran Irrigation District 27 Fed. Supp. 322, held:

> "A taxing agency is not to be denied relief under provision of Bankruptcy Act for composition of indebtedness because preliminary arrangements without which relief could not have

been sought were made before institution of proceedings or even before Act was in existence."

The Congress was cognizant of the deplorable financial condition of many of the taxing units of the country, 2019 of them being in default in January, 1934, (Mr. Justice Cardozo in Ashton v. Cameron Improvement District No. 1 56 Sup. Ct. 392, 292 U. S. 513, 80 L. Ed. 1309, 1315.). The facts before Congress at the time of the enactment of Sub-section (j) showed that recalcitrant minorities were preventing the completion of plans of composition or refunding agreements and that unless the taxing units were enabled to proceed under the bankruptcy laws to compel such recalcitrant minorities to accept a plan of composition after notice, hearing and approval thereof by the Court, such plans of composition would be rendered ineffectual and another collapse of the financial structure of the taxing units brought about or such recalcitrant minorities would be enabled to reap an undue advantage upon the sacrifices of the majority. The Respondent alleges in its petition (R. 15) that if it should be required to pay the unrefunded bonds in full it would default in its obligations on its refunding bonds. The holders of refunding bonds therefore are affected by the plan of composition as matter of fact and matter of law.

ASSIGNMENT NO. (5)

The Court of Appeals erred in ruling that holders of "old bonds", if creditors of a class whose rights are materially adversely affected by a proposed "plan of composition" may be coerced into accepting that "plan of composition" by holders of "refunding bonds", creditors of a different class whose rights are in no wise affected by the proposed plan of composition.

The Petitioner argues under this assignment that the Respondent's plan of composition is not as contemplated by the Municipal Bankruptcy Act because it does not provide for any changes in the status of the refunding bonds. The plan of composition was the one adopted on February 1, 1937, (R. 23-47). At that time the refunding bonds had not been exchanged for old bonds. Therefore, of course, the plan did not provide for any change in the refunding bonds but for the issuance of refunding bonds to be exchanged for old bonds and the present proceeding is simply one to complete that plan as respondent is especially authorized by Sub-section (j) to do.

The Petitioner still insists under this assignment that the creditors holding refunding bonds are in a different class from those holding unrefunded bonds. The respondent re-asserts its contention that the holders of refunding bonds are not creditors of a different class and that their relative position under Sub-section (j) is the same as it was before they exchanged their bonds for refunding bonds.

ASSIGNMENT NO. (6)

The Court of Appeals erred in failing to hold (a) that if the plan sought to be confirmed was the plan of February 1, 1937, (R. 23). it was necessarily not a plan of composition within the meaning of the Municipal Bankruptcy Act or Section 83 (j) thereof, (b) that if the plan sought to be confirmed was the plan of January 28, 1939, (R. 1), the holders of the "refunding bonds" were not creditors affected by the plan and their consents can not be used to coerce creditors who are affected by the plan and who are in a separate classification.

The Petitioner asserts under this assignment that because the Respondent proposed its original plan of adjustment on February 1, 1937, at a time there was no Municipal Bankruptcy Act in existence, the plan therefore could not have been a plan of composition within the meaning of the Municipal Bankruptcy Act, and also for the further reason that it did not contemplate submission to or approval by any Court or coercion of any non-assenting bondholders.

Sub-section (j) puts taxing units which have partially composed their indebtedness and those which have not on a parity.

The history of the enactment of Sub-section (j) shows that it was the intention of the Congress to meet just such a situation as that of Respondent and other taxing units which had partially completed a plan of composition and it is not material that there was no reference in the plan to bankruptcy or coercion of the non-assenting bondholders. As hereinbefore pointed out the statute was passed to overcome the decision of the Circuit Court of Appeals in the West Palm Beach case. In speaking of Sub-section (j) the Circuit Court of Appeals in the case of Vallette v. City of Vero Beach, 104 Fed. (2d) 59, says

> "During this time, the first Municipal Bankruptcy Act having been held unconstitutional, bankruptcy relief was not in contemplation, but on April 25, 1938, the case of United States vs. Bekins, 304 U. S. 27,58 Supreme Court 811, 82 Law Ed. 1137, was decided, upholding what is now Chapter IX of the Bankruptcy Act, and on June 22, 1938, the Chandler Act was approved, which added to Section 83, the Sub-section (j), 11 United States Code Annotated

Section 403 (j), which expressly allows the perfection in bankruptcy of a plan of composition begun before. The plan made for the City of Vero Beach was thereupon presented to the Court." (text p. 61)

"The effort at refunding began in December, 1936. The agent printed, had executed and validated the refunding bonds or most of them before bankruptcy was contemplated." (text p. 64)

In the case of Getz v. Edinburg Consolidated School District, 101 Fed. (2nd) 734, hn. 4, the Court held:

"A plan of composition of indebtedness offered by Consolidated Independent School District in Texas presented practical business problems to be decided on equitable grounds rather than legal technicalities."

At this point we call the Court's attention to the report of the Special Master to whom was referred the legal questions arising in a preliminary way in the matter (R. 132-137). The Master's report is a logical, and, we submit, correct view of the matter.

The Bankruptcy Statutes have been liberally construed to meet changing conditions:

"The fundamental and radically progressive nature of these extensions becomes apparent upon their mere statement; but all have been judicially approved or accepted as falling within the power conferred by the bankruptcy clause of the Constitution. Taken altogether, they demonstrate in a very striking way the capacity of the bankruptcy clause to meet new conditions

as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day. And these acts, far-reaching though they be, have not gone beyond the limit of congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed."

Continental Illinios National Bank and Trust
Company v. Chicago, etc.
294 U. S. 648
55 S. Ct. 595, 604
70 L. Ed. 1110,1125

"Power granted to Congress over subject of bankruptcy is plenary, and must be interpreted not in light of conditions with which framers of constitution were familiar, but in light of what is required under modern conditions to deal adequately with relationship existing between embarrassed debtors and their creditors".

Campbell v. Alleghany Corp.
75 Fed. (2nd) 947. Hn. 13.

"Congress may enact such bankruptcy legislation as it may deem wise and appropriate, constitutional grant of authority not being conditional nor limited, save that laws be uniform throughout the United States.

"Congress having express authority to enact bankruptcy legislation, was sole judge of means and their appropriateness to effectuate the pur-

pose of the legislation so long as means did not violate constitution."

In re Chicago R. I. & P. Ry. Co.
72 Fed. (2nd) 443
Hns. 1 and 4

"Bankruptcy power brings under control of Congress all phases of relationship between debtor financially embarrassed and his creditors and grant of power is not limited to forms in which power has heretobefore been exercised by Congress, or by laws relating to bankruptcy enacted in England or in American Colonies prior to adoption of the Constitution."

Campbell v. Alleghany Corp.
75 Fed. (2nd) 947, Hn. 8.

"The bankruptcy power is a broad power which should be exercised to meet new and changing conditions."

In re City of Ft. Lauderdale
23 Fed. Supp. 229, Hn. 5.

"Choice of means to carry into execution powers granted to Congress by the constitution rests with Congress, which may choose any means which in fact conduce to the exercise of such power."

In Re Contra Costa Irrigation District
10 Fed. Supp. 175 Hn. 8

"If by the statement that what the constitution meant at the time of its adoption it means

today, it is intended to say that the great clauses of the constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning: 'We must never forget that it is a constitution we are expounding.' (M'Culloch v. Maryland, 4 Wheat, 316, (4 L. Ed. 579,601). 'A constitution intended to endure for ages to come and consequently, to be adapted to the various crises of human affairs.' Id. p. 415. When we are dealing with the words of the constitution said this Court in Missouri v. Holland, 252 U. S. 416,433, 64 L. Ed. 641,647, 40 Supreme Court, 382, 11 A. L. R. 984, 'We must realize that they have called into life a being, the development of which could not have been forseen completely by the most gifted of its begetters . . . . ' 'The case before us must be considered in the light of our whole experience and not merely in that of what was said one hundred years ago.' "

Home Building and Loan Association v. Blaisdell,
290 U. S. 398,442
54 Supreme Court, 231,242,
78 L. Ed. 413,431,
88 A. L. R. 1481

ASSIGNMENT NO. (7)

The Court of Appeals erred in holding that Section 83 (j) of the Bankruptcy Act (11 U. S. C. A. Sec. 403 (j) should not be construed

as having retroactive application to securities received and rights abandoned before its adoption.

The Petitioner cites authorities under this assignment to the effect that a statute is not to be construed as retroactive in its application unless it is imperative that no other meaning can be given to it. The Respondent agrees with the general rule that statutes are to be construed prospectively only unless it is clear that they were intended to be restropective. It will be noted that Sub-section (j) expressly refers to the partial completion of a plan of composition *before* or after the filing of the petition. If the taxing unit had not exchanged its bonds before the passage of Sub-section (j) it would, of course, obtain the consent of the holders of the original bonds and there would be no necessity to have the consent of the holders of the refunding bonds and in fact as pointed out by the Special Master (R. 135) "The act could mean nothing and have no effect whatever" except in a retroactive sense.

ASSIGNMENT NO. (8)

The Court of Appeals erred in failing to hold that if Section 83 (j) of the Municipal Bankruptcy Act be construed as applicable to the case at bar and as authorizing creditors whose rights are unchanged by a "plan of composition" to compel acceptance of that plan by creditors whose rights are materially curtailed by that plan, and as authorizing the use on Jan. 28, 1939, for the purpose of determining the solvency or insolvency of the City, the bonds voluntarily and irrevocably shrunk on Feb. 1,

1937, not at their shrunken figures, but at the expanded figures existing prior to the voluntary shrinkage, it is null and void as being in violation of the provisions of the Federal Constitution, particularly Amendment V."

The Petitioner attacks the statute under this assignment as being in violation of the Fifth Amendment to the Constitution of the United States. The Petitoner seeks to illustrate the injustice of a plan of composition whereby, for example, 4,000 creditors have accepted bonds for $1,000.00 each and seek to put a remaining 240 creditors holding bonds in the sum of $1040.00 each on a parity with themselves under a plan of composition which deprived the minority of $40.00 each. On this point the Special Master said: (R. 136) "It may take some of their property away from them; if so, the same thing will have happened to the consenting majority".

Equality is one of the principles of American jurisprudence.

The Petitioner loses sight of the fact that a plan of composition cannot be imposed upon objecting creditors unless it has the approval of the Court after finding that it is fair and equitable and does not discriminate. To allow the holders of less than 4% of the securities of a taxing unit to retain their bonds bearing original rates of interest while the holders of 96% of the securities of the taxing unit have sacrificed enormous sums of interest and as in the West Palm Beach case a large part of the principal of their obligations, would be a flagrant violation of the American principles of equality. In the present case the original bonds bore interest at rates ranging

from five to six per cent while the refunding bonds, Series A, bear interest rates ranging from 1 to 2½ percent. over a period of 40 years and Series B bonds bear interest rates ranging from 2 to 3 percent. over a period of 40 years.

Petitioner contends (Petition, p. 19) that respondents insolvency is to be determined as of the date of the presentation of the plan to the Court rather than that of its adoption, and cites (Brief, p. 45) the record of a legislative attempt to make this clear. This amendment, if passed, would have been only a legislative confirmation of decisions cited below on that point.

Several efforts have been made by recalcitrant minorities to take advantage of the sacrifices of the majority and the Courts have frowned upon such attempts and denied such claims.

In the case of In re Merced Irrigation District, 25 Fed. Supplement, 981, in which more than 90% of the holders of irrigation district bonds had accepted the plan of composition and transferred their bonds for approximately 50 cents on the dollar, a counterproposal of dissenting bondholders, by which they would receive 100% of the principal of their bonds, was held to be inequitable and would not be considered. The Court in that case said (text p. 985):

> "This, if adopted by the Court, would enable less than 10% of the bondholders of the district to reap an unjust enrichment at the expense of more than 90% of the same class of bondholders who have accepted the plan and who have voluntarily ended any control over their

bonds for approximately 50 cents on the dollar. Such is undoubtedly the effect of the proposal of the non-consenting bondholders because, under it, they are permitted to retain the outstanding bonds, which they now own or control, and merely conditionally agree to accept a reduction of interest on all coupons, matured and unmatured, to 3% per annum in lieu of 5½% or 6% stipulated in the bonds. We believe the suggested modification to be inequitable, discriminatory, illegally preferential and unjust. It not only financially penalizes approximately 91% of the bondholders who consented to the plan before the court, and for no reason except that such bondholders did consent, and thereby contributed to bring about the present improved outlook for the District, but it also classifies the bondholders of the Merced Irrigation District into two groups or classes, when equity and fair treatment in a composition under the Bankruptcy Act of 1938 all of such bondholders should be considered on an equality and dealt with on parity . . . ."

Again, in the case of In re Lindsay-Strathmore Irrigation District, 25 Fed. Supplement 988, the Court said (text 992):

"If there has been any improved financial condition in this District, such has been due, we think, principally to the conditional loan from R. F. C. and the cooperation of the assenting original bondowners. The attitude of the objectors has not been financially helpful in any way. The record before us shows that the bonds of the District had fallen in price since default

in 1933 to a low of twenty-two cents on the dollar. They are now saleable, because of the plan under consideration, at a fraction under sixty cents on the dollar of principal face value."

In the last above cited case the holders of approximately 87% of the original obligations had consented to the plan, and in the Merced Irrigation District Case, the holders of approximately 90% had consented.

In the case of In re Drainage District No. 7, 25 Fed. Supplement 372, 98.2% of bondholders and 88.5% of judgment creditors accepted a plan of composition of Drainage District No. 7 of Poinsett County, Arkansas, under Sections 81-84 of the Bankruptcy Act, to which plan certain creditors filed objections. The Reconstruction Finance Corporation had acquired the interests of the consenting creditors at a loss of about 74c out of every dollar to such creditors, and the objecting creditors contended that, in view of the reduction of the indebtedness, their claims were now worth 100c on the dollar, and the Court said (text p. 376):

> "It had become evident that a minority were hanging back and seeking to obtain 100c on their minority debt as a result of the sacrifice of the majority, hoping that the district would become solvent as a result of the monies paid out by the Reconstruction Finance Corporation to consenting creditors.
>
> "To prevent this kind of situation was the very purpose of the debt readjustment act and is the purpose of the 1937 debt composition act."

In conclusion, the respondent, City of Sanford, Florida, submits that the petitioner has not made a sufficient showing to ask this Honorable Court to review the decision of the Circuit Court of Appeals and that the writ of certiorari prayed for should be denied.

Respectfully submitted,

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City of Sanford, Florida.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 323

AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE, PETITIONER

v.

CITY OF SANFORD, FLORIDA, AND THE UNITED STATES OF AMERICA (INTERVENOR)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the District Judge was entered without opinion (R. 153). The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 164) is reported in 112 F. (2d) 435.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 31, 1940 (R. 170). A petition for rehearing (R. 171–184) was denied July 8, 1940 (R. 186). The petition for a writ of cer-

tiorari was filed August 12, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended, 28 U. S. C. Sec. 347.

QUESTIONS PRESENTED

Over two-thirds of the creditors of a city, prior to the enactment of the Second Municipal Bankruptcy Act, voluntarily accepted refunding bonds in exchange for old bonds, pursuant to a plan submitted by the city. Later, after passage of the Act, the same plan was submitted by the city for confirmation in composition proceedings under Section 83 (j). The questions are:

1. Whether, for the purpose of determining whether sufficient creditors had consented to the filing of the petition and to the confirmation of the plan, the holders of the refunding bonds may be included among the consenting creditors.

2. Whether Section 83 (j), if construed to authorize their inclusion, violates the Fifth Amendment.

STATUTE INVOLVED

Section 83 (j) of the Bankruptcy Act as amended, June 22, 1938, c. 575, Sec. 3 (b), 52 Stat. 940 (11 U. S. C., Supp V, Sec. 403 (j)), provides:

> The partial completion or execution of any plan of composition as outlined in any petition filed under the terms of this Act by the exchange of new evidences of indebtedness under the plan for evidences of indebtedness covered by the plan, whether such partial completion or execution of such plan

of composition occurred before or after the filing of said petition, shall not be construed as limiting or prohibiting the effect of this Act, and the written consent of the holders of any securities outstanding as the result of any such partial completion or execution of any plan of composition shall be included as consenting creditors to such plan of composition in determining the percentage of securities affected by such plan of composition.

INTEREST OF THE UNITED STATES

The United States was granted leave to intervene, pursuant to the Act of August 24, 1937, c. 754, 50 Stat. 751 (28 U. S. C. Sec. 401), to uphold the constitutionality of the Act of June 22, 1938, c. 575, Sec. 3 (b), 52 Stat. 940, Section 83 (j) of the Bankruptcy Act (11 U. S. C., Supp. V, Sec. 403 (j)). This brief is accordingly limited to a discussion of the constitutional questions involved.

STATEMENT

On January 28, 1939, the City of Sanford, Florida, filed a petition for the confirmation of a "plan of composition" of its debts pursuant to Sections 81–84 of the Bankruptcy Act, 11 U. S. C., Supp. V, Secs. 401–404 (R. 1–83, 83–84). The petition set forth the financial status of the city and alleged that on February 1, 1937, it adopted a plan for the composition and adjustment of its indebtedness by the issuance of refunding bonds in exchange for outstanding bonds of the city (R. 2–7). The petition averred

that 87% of the bondholders had accepted the refunding bonds in exchange for the old bonds (R. 2), and that the plan had been accepted by not less than 51% in amount of the securities affected (R. 16, 83–84). The petition recited that the city was in default in the payment of principal and interest on its bonded indebtedness and was unable to pay its debts as they matured (R. 12–15) and that it was then insolvent (R. 7, 16). The district court approved the filing of the petition, appointed a Special Master to receive and file claims, and set a time for a hearing on the petition and answers and objections filed thereto (R. 85–86).

Answers and objections to the plan and a motion to dismiss were filed by various creditors, including petitioner (R. 93–109, 109–122, 123–128). In its answer, petitioner alleged that the creditors consenting to the plan consisted almost wholly of those who had accepted refunding bonds, that the acceptance of such bonds was irrevocable and not conditioned on the acceptance of or on the power to bind the others, and that if Section 83 (j) were construed to authorize inclusion of the consents of holders of refunding bonds in the 51% required for the filing of a petition, and in the 66⅔% required for confirmation of the plan, it was in violation of the Fifth Amendment (R. 110). On the day set for the hearing, the district court, being of the opinion that constitutional and legal issues had been raised (R. 131), referred the case to a Special Master to

report to the court upon the "preliminary questions of law raised by the pleadings" (R. 131).

The Special Master found Section 83 (j) constitutional (R. 135–137), to which finding exceptions and objections were filed (R. 137–138, 139–140, 141–144). The objecting creditors also moved for an order preserving their exceptions for a future hearing and for a rereference to the Special Master to take testimony. It was also suggested that the Attorney General be notified that the constitutionality of Section 83 (j) had been drawn in question (R. 144–147). The district court ordered the exceptions to be reserved, denied the motion for a rereference, and ordered that the Attorney General be notified (R. 148–149). The motion of the United States for leave to intervene (R. 149–151) was granted (R. 151–152), and the United States thereupon filed a petition of intervention supporting the constitutionality of the statute (R. 152–153). The report of the Special Master was affirmed and all exceptions thereto denied (R. 153–154).

Upon appeal, the Circuit Court of Appeals affirmed the orders (R. 164–170). The court concluded that Section 83 (j), both by reason of its plain language and its legislative history (see Appendix, *infra*), authorized the inclusion of the holders of the refunding bonds among the consenting creditors, and that, as thus applied, it did not violate the Fifth Amendment (R. 168).

ARGUMENT

Petitioner's contention that Section 83 (j) as here applied violates the Fifth Amendment is premised upon its claim that an identity of interest between itself and the majority bondholders does not exist in view of the settlement under which the majority accepted the refunding bonds. Hence, it argues, the refunding bondholders cannot constitutionally be authorized to express consent to the plan of composition on behalf of all bondholders even though the plan, concededly, would be valid in the event the interests of all the bondholders had remained identical.[1]

1. The fundamental premise of petitioner's argument simply ignores the fact that, at the time the present holders of the refunding bonds consented to the plan and exchanged the old securities for the new, they were in precisely the same position as the petitioner. Their acceptance of the refunding bonds is, therefore, a warranty of the fairness of the plan as applied to all bondholders, including the petitioner.

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[1] A necessary assumption in petitioner's line of argument is that the consent of a majority of creditors is necessary to the constitutional validity of a plan of composition. The court below did not expressly consider whether such consent is required. While the question does not arise here, in view of the numerous other defects in petitioner's argument, the Government does not concede that the Congress cannot constitutionally legislate on "the subject of bankruptcies" without making provision for majority consent in this class of case. See *United States* v. *Bekins*, 304 U. S. 27, 47.

2. It may be that the city is better able to pay the petitioner and the other dissenting bondholders by reason of the reduction in its indebtedness resulting from the settlement under which the majority accepted the refunding bonds. But their claimed advantage, we submit, is in no sense an interest of the type protected by the Fifth Amendment.

(a) Petitioner does not, and indeed cannot, question the fact that the settlement could have been made conditional upon the acceptance of the plan by all the creditors or upon an adjudication binding all the creditors in a composition proceeding; in either event, concededly, the settlement would not bar the right of the refunding bondholders to consent to the composition plan. The insubstantial character of the interest claimed by petitioner is also underscored by its failure to show that the city could not validly deprive the petitioner of all advantage from the settlement by issuing new bonds for municipal improvements.

It may be observed, moreover, that nothing in the Fifth Amendment would prevent the refunding bondholders and the city from voluntarily rescinding even a binding settlement, and thus restoring the *status quo*. Petitioner was neither a party nor an intended beneficiary of the settlement; it can scarcely urge that it has a vested right in the continuance of the incidental advantage thus conferred upon it. Compare *Edward Hines Trustees* v.

United States, 263 U. S. 143, 148; *Sprunt & Son* v. *United States,* 281 U. S. 249, 256–257.

(b) Petitioner's contention (Pet. 12–13), that under the local law of Florida the settlement is binding and cannot be rescinded by the parties, even if true, aids it not at all. It nowhere suggests that the Fifth Amendment precludes the State of Florida from authorizing the majority bondholders to rescind the agreement. Hence, its position in this respect may reasonably be compared with that of the shippers in the *Hines* and *Sprunt* cases, *supra,* who were denied the right to contest the validity of orders of the Interstate Commerce Commission modifying rates and practices of carriers (with respect to other shippers) from which complainants incidentally had derived a competitive advantage.

3. Even if it were to be assumed that the incidental advantage accruing to petitioner from the settlement is an interest of the type protected by the Fifth Amendment, the conclusion is clear that Section 83 (j) as applied is constitutional.

There is no question but that the consents of the majority, given at the time the refunding agreements were executed, could validly have bound petitioner under a composition agreement, identical with that here confirmed, had the Municipal Bankruptcy Act then been in existence. Petitioner's real objection, therefore, is that Section 83 (j) makes these same consents binding retroactively.

Yet the fact is evident that petitioner could not have avoided the operation of the Act even if put on notice of its existence; it is equally manifest that petitioner took no detrimental action in reliance on the absence of the Act. In these circumstances, surely, there is no ground for urging that the retroactive validation of the consents is not constitutional. Compare *Welch* v. ***Henry,*** **305 U. S. 134, 147–148.** The constitutionality of thus validating the consents, by enacting Section 83 (j), is especially assured by reason of the timeliness of Congress' action.[2] Compare *Welch* v. *Henry, supra,* at 148; ***Dunbar*** v. ***Boston & Providence R. R.,*** 181 Mass. 383, 386 (per Holmes, C. J.).

[2] The case of *Ashton* v. *Cameron County Dist.*, 298 U. S. 513, holding the first statute unconstitutional, was decided on May 25, 1936. The present act was passed during the next session of Congress on August 16, 1937, but, in view of the *Ashton* case, could hardly have been considered a reliable instrument for the reduction of municipal indebtedness until this Court's decision in *United States* v. *Bekins*, 304 U. S. 27, decided on April 25, 1938. Meanwhile, on April 14, 1938, the Circuit Court of Appeals for the Fifth Circuit handed down its decision in *In re City of West Palm Beach, Florida*, 96 F. (2d) 85, concluding that the holders of refunding bonds previously exchanged for their old securities could not be included as consenting creditors under the then-existing provisions of the statute. Accordingly, on June 22, 1938, the Congress enacted the amendment here in controversy, Section 83 (j), to remove the difficulty created by the *West Palm Beach* case. See Appendix, *infra.* In the circumstances, it can hardly be suggested that the Congress should have acted more expeditiously.

CONCLUSION

The decision of the court below is correct. There is no conflict of decisions. The petition for certiorari should, therefore, be denied.

Respectfully submitted.

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SEPTEMBER 1940.

APPENDIX

Legislative History of Section 83 (j) of the Bankruptcy Act, 11 U. S. C. § 403 (j)

After the decision in *In re City of West Palm Beach*, 96 F. (2d) 85, there was introduced into the House of Representatives, 75th Congress, 3d Session, a bill (H. R. 10753) to amend the Municipal Bankruptcy Act by adding the present subsection (j). The measure was reported favorably by the Committee on the Judiciary of the House of Representatives. The pertinent portion of the report (Report No. 2693, 75th Cong., 3d Sess.) reads as follows:

> The bill would amend the Municipal Bankruptcy Act (ch. 10 of the act of 1898 as amended, Public Law 302, 75th Cong.), to permit compositions by cities, etc., in accordance with the purposes of the original act (ch. 10).
>
> The necessity for the amendment arises by virtue of the decision of the Circuit Court of Appeals, Fifth Circuit, on April 14, 1938, in the *West Palm Beach, Florida, case,* where it was held that the act permits only plans of composition which are wholly executory, and that evidences of indebtedness already exchanged under the plan, prior to the filing of the petition, could not be included in computing the necessary percentage of securities held by consenting creditors to declare the plan operative.
>
> H. R. 10753 would permit the court to include new refunding bonds already exchanged under the plan of composition when figuring the percentage of consenting creditors, regardless of whether such ex-

> change was completed before or after the filing of the petition.
>
> In the *West Palm Beach case* about 85 percent of new bonds had been exchanged prior to filing the petition. The plan cannot be enforced under the circuit court of appeals case unless 66⅔ percent of the remaining 15 percent give their approval, thus effectively preventing the operaton of the act of 1937.

This bill was never acted upon by either branch of the Congress.

When the Chandler Act to amend the general bankruptcy statute was being considered in the same session of the Congress, Senator Pepper of Florida introduced subsection (j) as an amendment (83 Cong. Rec., p. 8728).

> Mr. PEPPER. Mr. President, I will state the purpose. Let us assume that under the existing municipal bankruptcy law a municipality which had engaged in no partial refunding of its obligations desired to make some adjustment of its total obligations outstanding. Under the existing municipal bankruptcy law, which was passed after its amendment occurred at the last session, that municipality could obtain the consent of 51 percent of its outstanding obligees, and present that to the court along with a plan of composition, and if two-thirds of all the obligees agreed to that plan of composition, then it would be possible for the court, by the approval of that plan, to put it into effect, and the plan would bind all the obligees. That is the provision of the existing municipal bankruptcy law.
>
> Before that municipal bankruptcy law went into effect there were a number of municipalities which had engaged in a partial

refunding, or, rather, had inaugurated a refunding program, which had been partially completed, but, in the absence of any laws to aid them, they were completely at the mercy of a recalcitrant minority of their obligees as to whether or not that refunding plan could succeed.

A very few bondholders could prevent the accomplishment of the whole refunding program, no matter if 98 percent of the obligees might desire that it go into effect.

Thus we found, after the passage of the municipal bankruptcy act, that it only provided that municipalities might have access to that act for the adjustment of their total outstanding obligations. When a case arising in West Palm Beach, Fla., went up on appeal, the United States Circuit Court of Appeals for the Fifth Circuit held that the municipal bankruptcy law was not applicable to that kind of a situation. That the consent of even 98 percent of the bondholders could not get the case into court for a fair consideration by a Federal judge. So my amendment merely proposes that municipalities coming within that class shall have resort to the Federal court, through the means of the municipal bankruptcy law, for a fair adjustment of their obligations upon the same principles that are laid down by the original Municipal Bankruptcy Act.

Mr. Austin. Mr. President, I recall this matter coming up at that time in the Committee on the Judiciary, and that we did not have time to give it a thorough study; and I must submit that I cannot see offhand whether this creates a special class of creditors——

Mr. O'Mahoney. It does not do that.

Mr. Austin. Or a special class of debtors.

Mr. O'Mahoney. It does not.

Mr. AUSTIN. Or whether it sets up a discrimination against any other class.

Mr. O'MAHONEY. It does not.

Mr. AUSTIN. I shall have to depend on the Senator from Wyoming for advice on that point.

Mr. O'MAHONEY. As I understand, 85 percent of the bondholders in the particular case have agreed to the proposal, but the agreement was made at such a time that it does not satisfy the present law. A bill identical with that of the Senator from Florida was introduced in the House by Representative Wilcox. It went to the House Judiciary Committee, and it was recommended favorably by that committee, and is now, as I understand, upon the calendar. A special subcommittee of the Senate Committee on the Judiciary considered it, and at the meeting of the committee last Monday the Senator from Delaware [Mr. Hughes] presented the report of that subcommittee. It was about to be accepted, and the bill was to have been reported favorably, when I suggested that the matter be held over in order that I could have an opportunity of reading the record and having it offered as an amendment to the bill now before us. I assure the Senator that the amendment is quite satisfactory. It is only a technical matter.

I hope the amendment will be adopted.

The PRESIDING OFFICER. The question is on agreeing to the amendment offered by the Senator from Florida [Mr. Pepper].

The amendment was agreed to.

This amendment was adopted by the Senate (83 Cong. Rec. 8729) and later by the House of Representatives, which adopted the Senate amendments to the Chandler Act without debate (83 Cong. Rec. 9101–9110).

U. S. GOVERNMENT PRINTING OFFICE: 1940